

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON

-----)
MICHAEL POFFENBARGER,)
)
Plaintiff,) CASE NO. 3:22-cv-01-TMR
)
-vs-)
)
HONORABLE FRANK KENDALL, et al.,) MOTION FOR PRELIMINARY
) INJUNCTION
Defendants.)
-----)

TRANSCRIPT OF PROCEEDINGS
THE HONORABLE **THOMAS M. ROSE**,
UNITED STATES DISTRICT JUDGE, PRESIDING
TUESDAY, FEBRUARY 22, 2022
DAYTON, OH

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Also Present: **Second Lieutenant Colonel Michael Poffenbarger**
Major Marc Nowak
Karen Hecker

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Mary A. Schweinhagen, RDR, CRR
Federal Official Court Reporter
200 West Second Street
Dayton, OH 45402
*** *** *** ***

10:10:58 1 P-R-O-C-E-E-D-I-N-G-S 10:10 A.M.

10:10:58 2 THE COURT: Good morning, everyone.

10:11:02 3 Counsel, to start off, this is not my normal courtroom,
10:11:08 4 so I may be a little bit out of the water too. So hopefully
10:11:15 5 you'll be able to hear everything I have to say and I will be
10:11:19 6 able to hear everything you have to say.

10:11:20 7 We're before the Court this morning in the matter of
10:11:26 8 Poffenbarger versus Kendall, and this is Case No. 3-22-cv-1.
10:11:35 9 And we're here for the purposes of a preliminary injunction
10:11:42 10 hearing.

10:11:42 11 Would counsel enter their appearance for the record.

10:11:45 12 MR. WIEST: Good morning, Your Honor. Chris Wiest
10:11:47 13 and Rob Bruns for the plaintiff.

10:11:50 14 MR. BRUNS: Good morning, Your Honor.

10:11:50 15 THE COURT: And you have Mr. Poffenbarger with you?

10:11:52 16 MR. WIEST: We do, Your Honor.

10:11:53 17 THE COURT: Thank you very much.

10:11:53 18 Counsel?

10:11:54 19 MR. CARMICHAEL: Yes, Your Honor. Andrew
10:11:58 20 Carmichael, Department of Justice, for defendants.

10:12:01 21 MS. YANG: And Catherine Yang also with the
10:12:03 22 Department of Justice.

10:12:06 23 MR. CARMICHAEL: I also have an agent and counsel
10:12:07 24 from the Department of Defense, Ms. Hecker; and from the Air
10:12:09 25 Force, Major Nowak.

10:12:10 1 THE COURT: Good morning. Good morning.

10:12:15 2 Counsel, it's my understanding from our pre-hearing, or
10:12:20 3 pre-hearing discussion in chambers that there is -- there is a
10:12:26 4 witness to be presented, I believe Mr. Poffenbarger, and then
10:12:28 5 the Court will entertain any arguments with regard to the
10:12:36 6 issues before the Court and this preliminary injunction.

10:12:40 7 So with that, Counsel.

10:12:43 8 MR. WIEST: Good morning, Your Honor. We'd like to
10:12:46 9 call first Lieutenant Mike Poffenbarger to testify.

10:12:52 10 THE COURT: All right.

10:12:54 11 **MICHAEL JERRY POFFENBARGER, PLAINTIFF'S WITNESS, SWORN**

10:13:04 12 THE COURT: One further thing, counsel. I have no
10:13:12 13 objection, and if counsel at counsel tables has no objection
10:13:19 14 and they are comfortable, you may lower or remove the masks.
10:13:26 15 Usually, what I try to do is limit any lowering of the masks
10:13:32 16 to questioning or when you are being spoken to.

10:13:35 17 Counsel, I am going to ask you to just keep your voice up
10:13:38 18 because you're right here and, I don't know, in close
10:13:42 19 proximity of my court reporter, and so we're going to ask you
10:13:45 20 to keep the masks on or everyone who approaches the podium
10:13:48 21 keep the mask on.

10:13:53 22 Lieutenant Poffenbarger, you may, if you wish, lower your
10:13:57 23 mask while testifying, if you so desire. If not, I need you
10:14:04 24 to pull that microphone over to you. I'm not sure exactly how
10:14:08 25 the acoustics are in here, but I need to hear and I'm sure

10:14:12 1 counsel will need to hear everything you have to say, all
10:14:14 2 right?

10:14:15 3 THE WITNESS: I'm comfortable taking it off, Your
10:14:17 4 Honor, if everyone else in the room is.

10:14:19 5 THE COURT: I think so. You may.

10:14:22 6 Counsel, you may proceed.

10:14:28 7 MR. Wiest: One second, Your Honor.

10:14:30 8 **DIRECT EXAMINATION**

10:14:31 9 BY MR. Wiest:

10:14:32 10 Q. Sir, can you state your name for the record?

10:14:33 11 A. Michael Jerry Poffenbarger.

10:14:35 12 Q. And you are -- I'm going to talk about educational
10:14:40 13 history in a minute, but you are currently a reservist
10:14:44 14 stationed at Wright-Patterson Air Force Base?

10:14:46 15 A. That's correct, sir.

10:14:47 16 Q. Mike, where'd you go to high school?

10:14:51 17 A. I went to Anderson High School in Anderson, Indiana.

10:14:53 18 Q. What year did you graduate?

10:14:54 19 A. 1998.

10:14:54 20 Q. What did you do after that?

10:14:56 21 A. I went to Hanover College.

10:14:57 22 Q. And did you graduate?

10:14:58 23 A. Yes, sir.

10:14:59 24 Q. What year?

10:14:59 25 A. 2003.

10:15:00 1 Q. Did you eventually come to enlist in the United States
10:15:06 2 Air Force?

10:15:07 3 A. Yes, sir. After the events of September 11, 2001,
10:15:11 4 while I was in college, I decided I wanted to do something
10:15:15 5 to protect my nation; and over the years following
10:15:19 6 graduation from college, I determined that I should join the
10:15:22 7 military.

10:15:23 8 Q. Okay. And to do that you ended up enlisting in the Air
10:15:26 9 Force?

10:15:26 10 A. Yes, sir.

10:15:27 11 Q. What was your initial job in the Air Force?

10:15:32 12 A. I was an airborne linguist.

10:15:35 13 Q. And what year did you -- do you have the date you ended
10:15:41 14 up joining the Air Force?

10:15:42 15 A. 29th of November, 2005.

10:15:45 16 Q. And that was active duty?

10:15:46 17 A. Yes, sir.

10:15:47 18 Q. And did you have any overseas deployments?

10:15:54 19 A. I did, sir.

10:15:54 20 Q. How many?

10:15:56 21 A. I had two total.

10:15:58 22 Q. If you could look at Exhibit 1 with me for a moment.

10:16:06 23 THE COURT: Counsel for the defendants, you have
10:16:09 24 seen these exhibits, correct?

10:16:11 25 MS. YANG: Yes, Your Honor, we have.

10:16:12 1 THE COURT: Thank you.

10:16:13 2 BY MR. Wiest:

10:16:13 3 Q. Other than the redaction of part of your social security
10:16:16 4 number, this is a -- this is your career data brief for the
10:16:21 5 Air Force Reserve Officer CDV, correct?

10:16:23 6 A. That's correct, sir.

10:16:24 7 Q. This is an Air Force record?

10:16:26 8 A. Yes, sir.

10:16:27 9 Q. And this reflects much of your service?

10:16:29 10 A. It's fairly complete, sir.

10:16:34 11 Q. Okay. It includes, it looks like, 905.8 combat hours?

10:16:43 12 A. That's correct, sir.

10:16:44 13 Q. Various aircraft that you were involved in when you were
10:16:48 14 on active duty?

10:16:49 15 A. That's correct, sir.

10:16:50 16 Q. Okay. At some point did you get married?

10:16:58 17 A. Yes, sir. So my wife -- dated on and off while I was
10:17:03 18 enlisted and deployed, and after I returned from my second
10:17:06 19 deployment, I asked her to marry me, and we were married in
10:17:12 20 June of 2012.

10:17:14 21 Q. At some point you left active duty and joined the
10:17:20 22 Reserves. Do you remember when that was?

10:17:22 23 A. Yes, sir. I received orders in 2013 that my follow-on
10:17:27 24 for a third enlistment would be to Cannon Air Force Base on
10:17:30 25 the EC-130. I discussed it with my wife since she was now

10:17:34 1 part of my life, and we determined that it was the best
10:17:36 2 course for my family to transfer to the Reserves and leave
10:17:41 3 active duty. And that was in 2014.

10:17:44 4 Q. And what -- what were your job assignments? And by the
10:17:56 5 way -- let me back up. When you went to the Reserves, was
10:17:59 6 that at Wright-Patterson Air Force Base?

10:18:01 7 A. Yes, sir, that's right.

10:18:03 8 Q. Okay. And that began in, I think you said, 2014?

10:18:06 9 A. Yes, that's correct.

10:18:07 10 Q. Okay. And what kinds of things were you doing -- let me
10:18:12 11 back up. Why did you want to transition to the Reserves?

10:18:15 12 A. So I had two things in mind. In leaving active duty I
10:18:21 13 did not have steady employment lined up when I moved back,
10:18:25 14 moving back home to Indiana, and I felt that it was
10:18:29 15 important that I had taken on responsibility of a family; at
10:18:36 16 that time I had a child and a wife, and they needed steady
10:18:38 17 income and they needed healthcare, needed taken care of.
10:18:42 18 And the Reserves was a way to take care of that.

10:18:44 19 I also felt that it was important to continue to serve
10:18:47 20 my country. I had a lot of experience that I could give,
10:18:50 21 and I wanted to continue that.

10:18:51 22 Q. And, currently, how many children do you have?

10:18:56 23 A. I have four children, sir.

10:18:58 24 Q. And what are their ages?

10:18:59 25 A. Eight, five, two, and three months.

POFFENBARGER - DIRECT (WUEST)

9

10:19:04 1 Q. When you left active duty, what -- what was your grade?

10:19:09 2 A. I was a staff sergeant, E-5.

10:19:13 3 Q. And at some point were you selected for officer training
10:19:16 4 school?

10:19:17 5 A. Yes, sir.

10:19:18 6 Q. And when was that?

10:19:19 7 A. In 2019, while I was at NCO Academy, I submitted
10:19:24 8 paperwork to the Wing for a deserving airman commissioning.
10:19:30 9 I was selected in -- I can't remember if it was the end of
10:19:33 10 2019 or early 2020 I was selected to OTS.

10:19:38 11 Q. Okay. And so you attended OTS when?

10:19:42 12 A. In August and September of 2021.

10:19:45 13 Q. And then you commissioned after that?

10:19:46 14 A. I commissioned -- I think my commissioning date is the
10:19:49 15 30th of September of 2021.

10:19:53 16 Q. Let's talk about your faith background just for a moment.

10:19:57 17 A. Yes, sir.

10:19:57 18 Q. What is your faith?

10:20:00 19 A. I'm a Christian, sir.

10:20:02 20 Q. And for how long have you been a Christian?

10:20:06 21 A. My entire life.

10:20:06 22 Q. Is there a flavor or denomination of Christianity that
10:20:11 23 you adhere to?

10:20:12 24 A. I was raised in a methodist church growing up.

10:20:17 25 Q. Did that affect in any way your decision to enlist? Was

10:20:20 1 that a factor?

10:20:22 2 A. Absolutely. No question.

10:20:23 3 Q. And why do you say that?

10:20:25 4 A. Christians are called upon to protect the weak. They
10:20:30 5 are called upon to serve those around us selflessly, to
10:20:36 6 leave everything if we must.

10:20:38 7 And after 2001, I knew that, as an adult man, I had the
10:20:47 8 capability to join the military, and I felt that I had a
10:20:50 9 responsibility to citizens in this country to do what I
10:20:53 10 could to protect my -- my nation and Constitution and
10:21:00 11 preserve everything I believe in.

10:21:04 12 Q. That's a great point you just brought up. When you
10:21:07 13 enlisted, did you take an oath?

10:21:08 14 A. Yes, sir, of course.

10:21:09 15 Q. And what was that oath to?

10:21:11 16 A. Protect and defend the Constitution of the United
10:21:14 17 States of America.

10:21:14 18 Q. All the Constitution?

10:21:15 19 A. The entire Constitution, sir.

10:21:17 20 Q. Did they except out the First Amendment?

10:21:19 21 A. No, sir.

10:21:19 22 Q. Okay.

10:21:21 23 A. I wouldn't have taken the oath if they had.

10:21:23 24 Q. Okay. Did you take a similar oath when you commissioned?

10:21:27 25 A. Of course.

10:21:28 1 Q. Let's look at Exhibit 2.

10:21:41 2 Is this a copy of a memorandum for all Department of Air
10:21:46 3 Force commanders that was issued by Secretary Kendall?

10:21:49 4 A. I have seen it. Yes, sir, it is.

10:21:52 5 Q. And this is a vaccine mandate, for lack of a better term,
10:21:53 6 in terms of a directive to enforce to obtain and receive the
10:21:57 7 COVID vaccine?

10:21:57 8 A. That is what it says, sir.

10:21:59 9 Q. And you received this, I'm guessing, shortly after
10:22:04 10 September 2001? September 3rd?

10:22:07 11 A. 2021, sir?

10:22:08 12 Q. Yes, sir, 2021.

10:22:09 13 A. While I was OTS, I received this, sir.

10:22:12 14 Q. Did you begin the religious accommodation process while
10:22:16 15 you were still at OTS?

10:22:17 16 A. About five minutes after we received this letter, sir,
10:22:20 17 I headed directly to the chaplain at OTS.

10:22:26 18 Q. Okay. And did the chaplain tell you what you needed to
10:22:29 19 do to submit an accommodation?

10:22:30 20 A. Yes. He said that the Air Force has religious
10:22:34 21 accommodation for vaccines, and that I should begin the
10:22:36 22 process by notifying the command there and the command at my
10:22:40 23 home station.

10:22:40 24 Q. And you did that?

10:22:41 25 A. I did that immediately, sir.

10:22:42 1 Q. Look at Exhibit 3 with me just for a minute.

10:22:50 2 This is a -- is this a copy of an order you received from
10:22:56 3 Lieutenant Colonel Sopko on or about October 22, 2021, to
10:23:01 4 receive the vaccine?

10:23:02 5 A. It is, sir.

10:23:03 6 Q. And he directed that you obtain the vaccine by 3 October,
10:23:07 7 although I do see that you could submit for an exemption was
10:23:11 8 an option as well?

10:23:13 9 A. That's correct, sir. And he was aware that I had
10:23:15 10 submitted a religious accommodation.

10:23:17 11 Q. And that was pending at that point in time?

10:23:20 12 A. Yes, sir.

10:23:20 13 Q. Were you interviewed by chaplains at OTS?

10:23:23 14 A. Yes.

10:23:23 15 Q. And how many chaplains interviewed you there?

10:23:25 16 A. I spoke with one over the phone and one in person
10:23:30 17 pertaining to the religious accommodation specifically.

10:23:33 18 Q. Did they confirm the sincerity of your beliefs?

10:23:36 19 A. To the best of my knowledge they did. They told me to
10:23:40 20 my face that they did.

10:23:41 21 Q. Look at Exhibit 4 for me real quick.

10:23:46 22 Your religious accommodation request went up, because you
10:23:50 23 were a reservist, to Lieutenant General Scobee, correct?

10:23:54 24 A. That's correct, sir.

10:23:55 25 Q. And is Exhibit 4 the denial of that accommodation request

10:23:58 1 that he issued on October 22, 2021?

10:24:00 2 A. It is, sir.

10:24:01 3 Q. I want to read a couple things in there with you and to
10:24:04 4 you. He says, "I do not doubt the sincerity of your beliefs,"
10:24:08 5 correct?

10:24:09 6 A. That's what it says, sir.

10:24:10 7 Q. He says, "All immunizations, including those listed
10:24:16 8 above, are an important element of mission accomplishment, as
10:24:23 9 they contribute to the health, safety, and readiness of the
10:24:23 10 force," correct?

10:24:23 11 A. Yes.

10:24:23 12 Q. And if we go down a little bit further, he says,
10:24:26 13 "Specifically regarding the COVID-19 vaccination, since less
10:24:28 14 restrictive means of protecting our force from COVID-19 are
10:24:31 15 unavailable, all uniformed Airmen must be fully vaccinated
10:24:34 16 against COVID-19 and other infections diseases." That's what
10:24:40 17 he told you?

10:24:40 18 A. Yes, sir.

10:24:40 19 Q. But we know that, in fact, the Air Force has granted
10:24:41 20 thousands of medical and administrative exemptions?

10:24:45 21 A. Yes, I know that, sir.

10:24:48 22 Q. Okay. You took an appeal of General Scobee's denial,
10:24:51 23 correct? On October 30, 2021. And that's at Exhibit 5?

10:24:55 24 A. Yes, sir, I submitted that.

10:24:56 25 Q. Okay. You comment -- by the way, are the statements that

10:25:03 1 you made in this exemption request true? Do they reflect your
10:25:06 2 beliefs?

10:25:06 3 A. Yes, sir. Of course. I wrote them.

10:25:09 4 Q. Okay. And I just want to reflect what you are telling --
10:25:13 5 in this case, this was a memo that was submitted to Lieutenant
10:25:17 6 General Miller, the Sergeant General of the Air Force,
10:25:19 7 correct?

10:25:19 8 A. Yes, sir.

10:25:22 9 Q. He's the appeal authority?

10:25:22 10 A. I believe so. That's what my understanding is, sir,
10:25:24 11 yes.

10:25:24 12 Q. I don't think the government's disputing that he is the
10:25:28 13 appeal authority, so we are good on that.

10:25:30 14 You say, "Murder is a sin as is participation in that
10:25:33 15 murder"?

10:25:34 16 A. It is.

10:25:34 17 Q. "All COVID-19 vaccines are associated with abortion"?

10:25:39 18 A. To my knowledge.

10:25:39 19 Q. At least all the current ones on the market.

10:25:42 20 A. To the best of my knowledge.

10:25:42 21 Q. "The J & J used abortion cell lines in the design,
10:25:45 22 production, and testing phases. The Pfizer and Moderna both
10:25:49 23 used these cell lines in the testing phase." And you cite the
10:25:52 24 articles that demonstrate that?

10:25:53 25 A. As I said, sir, to the best of my knowledge.

10:25:56 1 Q. Okay. And I realize you are not an expert, but you did
10:25:58 2 some research on this, and it violated your faith and your
10:26:01 3 conscience?

10:26:01 4 A. Yes, sir.

10:26:02 5 Q. Have you ever received vaccines in the past?

10:26:10 6 A. Yes, sir, of course.

10:26:12 7 Q. At the time that you did -- let me back up. Have you
10:26:18 8 always held these beliefs regarding the aborted fetal cell
10:26:23 9 issue?

10:26:23 10 A. Well, I have always held that abortion is an evil --

10:26:23 11 Q. Okay.

10:26:26 12 A. -- and a sin to partake in, to be a part of.

10:26:32 13 Q. And would it be fair to say that if you've received
10:26:36 14 vaccines in the past, it would be because you didn't have
10:26:41 15 knowledge that they contained these illicit cell lines?

10:26:45 16 A. That's correct, sir. I had absolutely no idea that a
10:26:46 17 medical establishment in this country would use aborted
10:26:48 18 fetuses in any way, shape, or form in medicine.

10:26:51 19 Q. If a vaccine were to come out on the market that did not
10:27:00 20 contain or was not tested with and was not derived from
10:27:04 21 aborted fetal tissue related to COVID-19, would you receive
10:27:08 22 that vaccine?

10:27:09 23 A. Sir, a vaccine that has good safety data and has been
10:27:14 24 endorsed by the government and does not contain aborted
10:27:17 25 fetal cells or does not use them, of course I would take

10:27:21 1 that, sir.

10:27:22 2 Q. All right. General Miller -- look at Exhibit 6 with
10:27:27 3 me -- denied your appeal on December 8, 2021. Yes?

10:27:35 4 A. Yes, he did.

10:27:36 5 Q. And this is the copy of that?

10:27:39 6 A. Yes, it is.

10:27:39 7 Q. Does he address at all in here why they've granted
10:27:50 8 thousands of medical and administrative exemptions but he is
10:27:54 9 denying your religious exemption?

10:27:56 10 A. I didn't see anything in here that explained why.

10:27:58 11 Q. All right. As a result of that, you were called to
10:28:03 12 active duty for the purposes of receiving discipline, correct?

10:28:07 13 A. Yes, sir, that's correct.

10:28:08 14 Q. And that was done on your -- you were to report to active
10:28:14 15 duty on January 3, 2022?

10:28:20 16 A. My commander, Lieutenant Colonel Kojack, called me on
10:28:23 17 the phone and notified me of that fact immediately after I
10:28:26 18 received the letter from Lieutenant General Miller, that
10:28:29 19 they would be calling me in in order to discipline me, and
10:28:33 20 that that would be the first week of January of this year.

10:28:36 21 Q. And rather than allow you the normal 45-day response
10:28:40 22 time, they took the extra step of putting you on active duty
10:28:42 23 to cut that response time to three days?

10:28:44 24 A. That's correct, sir.

10:28:45 25 Q. Okay. And, in fact, that's what they did, and there is a

10:28:51 1 record of that at Exhibit 7. Yes?

10:28:54 2 A. That's exactly what they did, sir.

10:28:58 3 Q. Exhibit 7 also, if you go a couple pages back after the
10:29:01 4 letter of reprimand, indicates that you're being denied
10:29:04 5 participation for points in pay?

10:29:05 6 A. Yes, sir.

10:29:06 7 Q. Right? You responded to that on 6 January, in part
10:29:10 8 asking them just to stay their hand pending this litigation.
10:29:13 9 And what ended up happening -- and we see that on -- towards
10:29:17 10 the second to last page of this exhibit -- Colonel Smith said,
10:29:20 11 "Nope. I'm going to go ahead and I am confirming this letter
10:29:23 12 of reprimand," right?

10:29:25 13 A. That's correct, sir, yes.

10:29:26 14 Q. And then you asked -- because your family needs their
10:29:30 15 health insurance, you went and asked Senior Airman Mather to
10:29:34 16 confirm when your health insurance was going to be terminated,
10:29:37 17 and that memo is reflected on the 7 January memo at the end of
10:29:44 18 Exhibit 7?

10:29:45 19 A. Yes, sir. I have a young baby, and he needs to see the
10:29:49 20 doctor quite regularly, and I was afraid that we would be
10:29:52 21 liable for a lot of medical bills if I didn't know exactly
10:29:55 22 when my health insurance would be cut off from this action.

10:29:59 23 Q. I want to look at Exhibit 8 with you.

10:30:03 24 A. Okay.

10:30:05 25 Q. Because a couple days later, following a status call with

10:30:10 1 this Court, they rescinded the letter of reprimand, reissued
10:30:19 2 it, and put you on a 45-day clock to respond?
10:30:23 3 A. Yes, sir, that's correct.
10:30:24 4 Q. Okay.
10:30:25 5 A. I was very surprised at that.
10:30:28 6 Q. And as I understand it, that response is -- because you
10:30:31 7 signed for it on January 14th?
10:30:33 8 A. Yes, sir.
10:30:33 9 Q. Of 2022, right?
10:30:35 10 A. My mother-in-law signed for it, sir.
10:30:37 11 Q. She was your agent?
10:30:38 12 A. Yes, sir.
10:30:39 13 Q. She signed for it. That response is due on February 28,
10:30:42 14 2022, and we have no reason to believe Colonel Smith won't
10:30:46 15 confirm the letter of reprimand again on that date?
10:30:49 16 A. I'm assuming that he was so quick to do the same
10:30:53 17 before, that he will do the same again.
10:30:54 18 Q. And so your family stands to lose the TriCare insurance
10:30:58 19 on March 1, 2022?
10:30:59 20 A. We are trying to make contingency plans for that
10:31:03 21 happening, sir, yes.
10:31:05 22 Q. Okay. You joined the Reserves in part for retirement;
10:31:12 23 yes?
10:31:12 24 A. Yes, sir.
10:31:13 25 Q. You served -- let me go back and look at this -- 2005 to

10:31:23 1 2012, seven years of active duty?

10:31:26 2 A. 2014, sir.

10:31:27 3 Q. 2014?

10:31:28 4 A. I believe I have nine or --

10:31:30 5 Q. Nine years?

10:31:31 6 A. In the neighborhood of nine years.

10:31:32 7 Q. Nine years of active duty, and then as a reservist you

10:31:36 8 accrue pay and points that ultimately allow you to obtain a

10:31:40 9 military retirement when you turn, is it, age 60 or 65?

10:31:42 10 A. So I will be eligible for retirement after I have 20

10:31:45 11 good years, which will be coming up here in a couple years,

10:31:49 12 but you don't receive full retirement benefits until you

10:31:50 13 reach age 60 minus the number of times you have been

10:31:54 14 deployed. There is a calculus involved that I am not really

10:31:57 15 qualified to discuss. It's complicated.

10:31:59 16 Q. You are not 100 percent sure how it works?

10:32:01 17 A. I just know that it's somewhere around age 60 that you

10:32:05 18 start receiving retirement pay.

10:32:07 19 Q. And obviously no points/no pay means no retirement,

10:32:09 20 right?

10:32:09 21 A. Correct, sir.

10:32:10 22 Q. Because you are not getting good years, correct?

10:32:12 23 A. I am not getting good years, and I haven't reached 20

10:32:15 24 good years of service yet, sir.

10:32:17 25 Q. Do you know that begs the question, I mean, you've had

10:32:22 1 all this time in the Air Force, all this time serving your
10:32:24 2 country. Why not just go and get the vaccine? Wouldn't it be
10:32:28 3 easier?

10:32:29 4 A. Just because it's easy doesn't mean it's right.

10:32:37 5 Q. You understand that if they wanted to escalate this as a
10:32:40 6 reservist, you know, they could put you in prison. Would that
10:32:43 7 be enough to get you to -- to obtain this vaccine?

10:32:46 8 A. No, sir. Although I do not wish to go to prison -- I
10:32:52 9 have a family to take care of -- it is my duty to uphold my
10:33:01 10 faith under peril of life or death.

10:33:06 11 MR. WIEST: I have no further questions.

10:33:08 12 THE COURT: All right.

10:33:10 13 MR. WIEST: One second, Your Honor.

10:33:12 14 (Pause.)

10:33:25 15 BY MR. WIEST:

10:33:25 16 Q. Just one final question. You said you joined the
10:33:27 17 military to help protect the weak?

10:33:28 18 A. Yes, sir.

10:33:29 19 Q. Is there anyone that is more weak than the unborn?

10:33:32 20 A. Not to my knowledge, sir.

10:33:35 21 Q. Thank you.

10:33:34 22 MR. WIEST: Your Honor, I have nothing further.

10:33:40 23 THE COURT: So, Mr. Poffenbarger?

10:33:44 24 THE WITNESS: Yes, Your Honor.

10:33:45 25 THE COURT: Just to clarify what you have said,

10:33:47 1 basically what you're saying is, is that you have received a
10:33:50 2 number of vaccines in the past, whether or not you did not
10:33:56 3 realize or know whether or not those vaccines entailed the
10:33:59 4 same type of makeup that this vaccine does, and so therefore
10:34:03 5 you went ahead and got those vaccines, correct?

10:34:07 6 THE WITNESS: Yes, Your Honor.

10:34:07 7 THE COURT: All right. And so are you saying that
10:34:10 8 if another vaccine with regard to COVID-19 were developed, not
10:34:19 9 utilizing those substances to which you have shared with the
10:34:24 10 record you object to, that you would not hesitate to get that?

10:34:27 11 THE WITNESS: No hesitation, Your Honor.

10:34:29 12 THE COURT: Thank you.

10:34:29 13 You may inquire.

10:34:39 14 MS. YANG: Thank you, Your Honor.

10:34:32 15 **CROSS-EXAMINATION**

10:34:35 16 BY MS. YANG:

10:34:41 17 Q. Good morning, sir.

10:34:41 18 A. Good morning, ma'am.

10:34:42 19 Q. My name is Catherine Yang. I am with the Department of
10:34:42 20 Justice.

10:34:45 21 Sir, as a reservist, you also have civilian employment;
10:34:48 22 is that right?

10:34:48 23 A. Yes, ma'am, that's correct.

10:34:48 24 Q. Is that full-time or part-time?

10:34:50 25 A. That's a full-time job, ma'am.

10:34:51 1 Q. And what is that job?

10:34:52 2 A. I'm a field surveyor, ma'am.

10:34:55 3 Q. Is that indoor work, outdoor work, or --

10:34:58 4 A. Outdoor work, ma'am.

10:34:59 5 Q. Outdoor work entirely?

10:35:01 6 A. Yes, ma'am.

10:35:02 7 Q. Do you have to physically interact with other people in

10:35:04 8 that job?

10:35:04 9 A. From time to time, yes, ma'am.

10:35:06 10 Q. Approximately how much of your week is spent interacting

10:35:09 11 physically with other people in that job?

10:35:11 12 A. Well, I'm alone most of the day. I have one other

10:35:17 13 coworker, but we rarely spend time together because it's --

10:35:22 14 most of the stuff is automated now. So setting up an

10:35:25 15 instrument and working on a handheld computer, I don't

10:35:28 16 really need to be around anybody.

10:35:30 17 I couldn't really give you numbers like percentagewise,

10:35:33 18 but maybe a couple hours in the morning and then a couple

10:35:36 19 hours in the afternoon when we're packing things up.

10:35:41 20 Q. Thank you. And approximately how many people do you

10:35:43 21 physically interact with in a regular week in this job?

10:35:46 22 A. A regular week, just one.

10:35:47 23 Q. Do you attend church services on a regular basis?

10:35:50 24 A. Yes, ma'am.

10:35:50 25 Q. How often?

10:35:51 1 A. It depends. Usually once or twice a week.

10:35:55 2 Q. Are those held indoors or outdoors?

10:35:57 3 A. Both sometimes.

10:35:58 4 Q. Is there a -- is there a common practice of -- would you

10:36:02 5 say that the proportion of services that are held indoors is

10:36:07 6 greater than the services that are held outdoors, or are they

10:36:11 7 pretty equal?

10:36:11 8 A. Yes, ma'am. I live in Indiana. It's cold in the

10:36:14 9 wintertime, so --

10:36:15 10 Q. I understand. What is the size of your congregation?

10:36:18 11 A. Oh, maybe -- maybe, in total, 100. I couldn't say for

10:36:23 12 sure.

10:36:23 13 Q. Would you say that the services are pretty well attended?

10:36:25 14 A. Sometimes. Like most churches in America, the vast

10:36:29 15 majority of them are older. So I'd say maybe 50 percent of

10:36:35 16 the congregation is regular.

10:36:38 17 Q. Do you -- do you go out to eat at restaurants?

10:36:41 18 A. Sometimes.

10:36:43 19 Q. Approximately how often would you say you go out to eat

10:36:46 20 at restaurants?

10:36:47 21 A. Once a month maybe, we get a date night.

10:36:52 22 Q. When you have your date nights, do you dine in or do you

10:36:57 23 take out?

10:36:57 24 A. Both, but usually we take out.

10:37:00 25 Q. How many times in the last few months have you dined in

10:37:03 1 at a restaurant?

10:37:04 2 A. Well, I did last night. But maybe three times, maybe

10:37:12 3 twice.

10:37:14 4 Q. As a reservist, you have been assigned to the

10:37:17 5 intelligence office; is that correct?

10:37:19 6 A. Yes, ma'am.

10:37:19 7 Q. And before you can perform your duties as an intelligence

10:37:23 8 officer, you are required to attend and complete intelligence

10:37:27 9 officer training; is that correct?

10:37:28 10 A. Yes, ma'am, that's correct.

10:37:28 11 Q. And that's different from the officer training school

10:37:30 12 that you completed last fall?

10:37:33 13 A. Yes, ma'am.

10:37:33 14 Q. You haven't yet attended or completed that intelligence

10:37:36 15 officer training, have you?

10:37:37 16 A. No, ma'am, not yet.

10:37:38 17 Q. Are you aware that the average class size for the

10:37:42 18 intelligence officer training is 15 people?

10:37:45 19 A. I wasn't aware of that, but it doesn't surprise me.

10:37:48 20 Q. Are you aware that the training lasts for approximately

10:37:51 21 five months?

10:37:51 22 A. I've heard six months, but that's good news if it's

10:37:55 23 only five.

10:37:55 24 Q. And that's five days a week, about eight hours a day for

10:37:58 25 that period of time?

10:37:59 1 A. I think so. There's usually study halls and stuff
10:38:02 2 afterwards. I was a good fellow before with my previous
10:38:06 3 jobs, and the days were usually quite long.

10:38:08 4 Q. Are you aware that the training for intelligence officer
10:38:11 5 training, that's held in a secured facility?

10:38:14 6 A. I believe most of it is, yes, ma'am.

10:38:18 7 Q. And as a result of the secure facility, it means that
10:38:21 8 there are no windows or doors or outside ventilation that can
10:38:25 9 occur. Are you aware of that?

10:38:26 10 A. Yes, ma'am.

10:38:27 11 Q. Are you aware that about 87 percent of the training
10:38:30 12 material is classified and can only be accessed through the
10:38:33 13 secure facility?

10:38:33 14 A. I'm surprised it's only that percentage.

10:38:37 15 Q. You would expect it to be higher?

10:38:39 16 A. I would expect it to be higher, yes, ma'am.

10:38:40 17 Q. And are you aware that you would have to share work
10:38:43 18 stations with others in the training?

10:38:43 19 A. That's not a surprise, ma'am.

10:38:45 20 Q. In addition to that training, you are also required to
10:38:49 21 attend unit training assemblies, or UTAs. Are you familiar
10:38:54 22 with that?

10:38:54 23 A. Yes, ma'am. Usually not concurrent with that training.
10:38:57 24 It's usually before and after the training period.

10:38:58 25 Q. Understood. And the UTAs are a designated weekend each

10:39:01 1 month when reservists like yourself would go in to perform
10:39:06 2 their duties; is that right?

10:39:06 3 A. Yes, ma'am.

10:39:06 4 Q. And there are designated weekends for the entire unit; is
10:39:11 5 that right?

10:39:11 6 A. So Wright-Patterson Air Force Base usually has a
10:39:15 7 schedule that's split, even before the reaction to COVID and
10:39:20 8 the things that have been in place since then, where there
10:39:23 9 is what they call a scarlet weekend and a gray weekend. I
10:39:28 10 don't know that it's split 50/50, but that's usually what
10:39:31 11 they do is they bring in approximately half the reservists
10:39:33 12 for one weekend, half the reservists for the other. I don't
10:39:37 13 know specifically why, but I assume that it has to do with
10:39:39 14 the number of facilities on base for that number of people.

10:39:41 15 Q. Understood. But the unit is -- comes in for their UTA
10:39:46 16 weekend on a designated schedule. Is that fair to say?

10:39:49 17 A. Yes, ma'am.

10:39:52 18 Q. And that work would also occur in a secure facility,
10:39:54 19 right?

10:39:54 20 A. Some of it, yes, ma'am.

10:39:56 21 Q. Would you be able to say what proportion occurs in a
10:40:01 22 secure facility and what doesn't?

10:40:02 23 A. Well, I am not fully qualified yet, ma'am, but I would
10:40:05 24 say, my guess just from what I've seen, is probably 50/50.

10:40:11 25 Q. And your work as an intelligence officer would require

10:40:17 1 the use of classified materials and systems; is that right?

10:40:20 2 A. Yes, ma'am.

10:40:20 3 Q. And those are the types of materials and systems that
10:40:23 4 would have to be in a secure facility in order to access; is
10:40:26 5 that right?

10:40:26 6 A. From what I am aware, yes, ma'am.

10:40:28 7 Q. Are you aware of secure materials and systems that you
10:40:32 8 can access not from a secured facility?

10:40:33 9 A. Well, going to and from aircraft and things like that,
10:40:37 10 ma'am, sometimes -- again, I'm not fully qualified. So my
10:40:42 11 understanding is sometimes classified materials have to be
10:40:44 12 taken between areas. But I may be wrong in that.

10:40:48 13 Q. And are you -- are you familiar with the term "the
10:40:55 14 vault" --

10:40:56 15 A. Yes, ma'am.

10:40:56 16 Q. -- at Wright-Patterson, and that refers to the secure
10:41:01 17 facility that you are working in?

10:41:02 18 A. Yes, ma'am. I believe that's a classified secret
10:41:04 19 facility maybe, and that's within the 445th OSS building.

10:41:09 20 Q. Right. To the best of your knowledge, information --
10:41:12 21 classified information can't be taken out of the vault, can
10:41:16 22 it?

10:41:16 23 A. As I said, ma'am, I have not fully trained on that yet,
10:41:23 24 so I wouldn't speak to it, but I assume that classified
10:41:26 25 material is not coming and going all day long, if that's

10:41:28 1 what you are asking.

10:41:29 2 Q. And your work there in the vault would also require
10:41:32 3 interaction with other people too, right?

10:41:35 4 A. There is a small group that work in the vault all day.

10:41:38 5 Q. Sure. Exchanging information, you know, classified
10:41:41 6 information as an -- as to be intelligence officers would
10:41:45 7 require some amount of collaboration between individuals,
10:41:49 8 correct?

10:41:49 9 A. Yes.

10:41:50 10 Q. You -- I believe you explained earlier that you
10:41:52 11 commissioned as an officer in September of last year; is that
10:41:55 12 right?

10:41:55 13 A. Yes, ma'am, that's correct.

10:41:56 14 Q. And since then, have you attended just one UTA weekend?

10:42:00 15 A. I think that's correct, ma'am. I had to come in
10:42:14 16 several times between my commissioning date and the weekend
10:42:23 17 in January. I know that one of those was a UTA weekend. I
10:42:26 18 can't remember if the other ones were they just brought me
10:42:29 19 in on orders to take care of paperwork or how they were
10:42:34 20 classified. I'm not sure.

10:42:34 21 Q. Okay. How many people were there with you in the vault
10:42:36 22 during your UTA weekend?

10:42:38 23 A. I did not take a head count, ma'am, but my guess would
10:42:46 24 be six or eight others, ma'am.

10:42:47 25 Q. Do you know whether that was a low, normal, high

10:42:50 1 participation UTA weekend?

10:42:54 2 A. As you said, I haven't been there very often. So I
10:42:57 3 don't have enough experience to say if that's low or high.

10:43:00 4 I have no idea.

10:43:00 5 Q. Sure. Are you aware that there can be up to 21 people
10:43:04 6 participating during any given UTA weekend?

10:43:07 7 A. I don't know, ma'am, but that doesn't surprise me.

10:43:10 8 Q. Do you have any reason to disagree that that would be the
10:43:12 9 case?

10:43:13 10 A. No, ma'am. I'll stipulate to that.

10:43:15 11 Q. When you went in for the UTA weekend, you were working in
10:43:20 12 the common area; is that right? At the vault?

10:43:22 13 A. Yes, ma'am.

10:43:22 14 Q. And there are about six desks in that area?

10:43:25 15 A. That's about right, yes, ma'am.

10:43:26 16 Q. To the best of your memory.

10:43:29 17 And to the best of your memory, were there floor-to-
10:43:33 18 ceiling walls separating those desks?

10:43:34 19 A. So the desks are maybe about as big as this area right
10:43:37 20 here (indicating), maybe a little bit wider, and the walls
10:43:40 21 going up may five feet. Not all the way to the ceiling but
10:43:45 22 you have to peer over them. They're not low like these
10:43:48 23 walls are here.

10:43:48 24 Q. Sure. But it's not enclosed spaces?

10:43:51 25 A. They are not enclosed offices, no, ma'am.

10:43:53 1 Q. And are you aware that -- or, rather, you -- I believe
10:43:58 2 you have submitted a declaration in this case where you have
10:44:01 3 described some offices, you know, off behind that common area
10:44:05 4 that you work in. Do you remember that?

10:44:06 5 A. Yes. So it's kind of an open room, maybe about as big
10:44:09 6 as this is, and then like if this were that area, like there
10:44:13 7 would be offices on that wall and then maybe two bigger
10:44:17 8 rooms in this wall behind me. Something like that.

10:44:18 9 Q. Are you aware that those offices are reserved for senior
10:44:22 10 officers and leadership?

10:44:23 11 A. The ones on that side are. These back here
10:44:26 12 (indicating) are like conference room area and offices.

10:44:28 13 Q. Do you have any reason to dispute that the offices are
10:44:30 14 reserved for the senior officers and leadership?

10:44:33 15 A. No dispute, ma'am.

10:44:35 16 Q. You are still currently getting your reduced rate health
10:44:44 17 insurance benefits as of right now, correct?

10:44:47 18 A. Right now -- I have been charged for this month, yes,
10:44:50 19 ma'am.

10:44:50 20 Q. And you haven't been discharged from the service?

10:44:52 21 A. So as that paper stated, they have rescinded all of
10:44:57 22 that. So I don't -- it's up in the air. But as of this
10:45:02 23 date, I believe I'm on a no-pay/no-point status.

10:45:06 24 Q. Are you familiar that discharge within the military has a
10:45:10 25 very specific meaning?

10:45:11 1 A. Yes, ma'am.

10:45:11 2 Q. And have you been discharged --

10:45:12 3 A. No, ma'am.

10:45:12 4 Q. -- from the service?

10:45:15 5 To the best of your knowledge, are there any discharge

10:45:15 6 proceedings that have been initiated?

10:45:17 7 A. So they have been initiated -- from my understanding of

10:45:24 8 how it all was going to work, they were initiated and then

10:45:28 9 they were rescinded the week after -- what was that

10:45:33 10 letter -- the 10th of January.

10:45:34 11 Q. So there are no -- no further discharge proceedings that

10:45:38 12 have been initiated as of this date?

10:45:40 13 A. No, ma'am.

10:45:40 14 Q. And you have been told that if you don't get vaccinated

10:45:45 15 you are going to be reassigned to the Individual Ready

10:45:50 16 Reserve; is that right?

10:45:50 17 A. Pending discharge, yes, ma'am.

10:45:52 18 Q. You've been instructed that you --

10:45:55 19 A. That's what I have been --

10:45:56 20 Q. -- the end of your IRR?

10:45:58 21 A. Yes, ma'am, I have been told that they are putting me

10:46:02 22 on IRR until they can discharge me.

10:46:04 23 Q. Who told you that?

10:46:05 24 A. Lieutenant Colonel Kojack and the -- all the people

10:46:13 25 that were in the line when we went through our IRR

10:46:18 1 processing line, they said that you are going to sign this
10:46:20 2 paperwork, and this will begin a proceedings to put you on
10:46:25 3 IRR. And then after IRR, then you'll be discharged from the
10:46:27 4 service.

10:46:27 5 **Q.** And IRR remains part of the military; is that right?

10:46:32 6 **A.** So, yes, it's a part of the military that has no
10:46:37 7 benefits, and you don't get health insurance, and you get no
10:46:39 8 points, and it doesn't count towards retirement to my
10:46:44 9 understanding. Again, I'm not a personnelist. But, yes, I
10:46:51 10 guess you are classified within the scope of military.

10:46:53 11 **Q.** And you have the ability to transition back into the
10:46:56 12 selected reserve that you are currently a part of back to and
10:47:00 13 from the IRR to the selected reserve as services allow; is
10:47:05 14 that correct?

10:47:05 15 **A.** I spoke to Lieutenant Colonel Kojack about that, and he
10:47:09 16 said that, pending decisions in the future, that I could
10:47:13 17 request from him, if I'm still in the IRR after they
10:47:20 18 discharge me, I would have to go back through a recruiter.
10:47:24 19 If he has a need for my service or the recruiter can find a
10:47:28 20 placement for me, then they would be able to transfer me
10:47:31 21 back into the Active Reserves.

10:47:32 22 **Q.** And the IRR itself is not discharge, correct?

10:47:37 23 **A.** No, ma'am. It's a -- it's like a -- it's way that they
10:47:45 24 can -- honestly, ma'am, I don't understand why we even have
10:47:48 25 an IRR, but it's just a placeholder, I guess, between active

10:47:53 1 reserve service and not being a part of the military.

10:47:57 2 Q. Are you aware that you can remain eligible for promotion

10:48:00 3 even when you are in IRR?

10:48:01 4 A. I'm not aware of that, ma'am.

10:48:03 5 Q. Do you have any reason to dispute that that's the case?

10:48:05 6 A. No, ma'am.

10:48:06 7 Q. And that at the end of your military obligation, if you

10:48:11 8 are in the IRR, you can also still be honorably discharged.

10:48:15 9 Are you aware of that?

10:48:17 10 A. I am not aware of the specifics of how discharges from

10:48:20 11 the IRR work.

10:48:22 12 Q. But you don't --

10:48:22 13 A. I don't dispute that.

10:48:23 14 Q. -- dispute that? You have no reason to dispute that?

10:48:26 15 A. No, I have no reason to dispute that.

10:48:29 16 Q. You haven't been court-martialed, have you?

10:48:31 17 A. No, ma'am, not to my knowledge.

10:48:35 18 Q. You haven't been notified that you had --

10:48:35 19 A. No, ma'am.

10:48:35 20 Q. You haven't been threatened with prison?

10:48:37 21 A. No, ma'am.

10:48:39 22 Q. Members of the reserve are held to the same medical

10:48:44 23 readiness and training standards as Active Duty Reserves; is

10:48:48 24 that right?

10:48:48 25 A. Yes, ma'am. Sometimes there are longer periods for

10:48:52 1 compliance, but all together, yes.

10:48:56 2 Q. Are the requirements --

10:48:58 3 A. The requirements remain the same. It's just sometimes
10:49:00 4 the timelines are different.

10:49:01 5 Q. And the requirements remain the same because the purpose
10:49:04 6 of the reserve is to be ready to mobilize and back-fall for
10:49:08 7 active duty if the need arises; is that right?

10:49:11 8 A. Yes, ma'am.

10:49:12 9 Q. And if you were called for active duty, you would be
10:49:15 10 serving alongside other active duty service members, correct?

10:49:19 11 A. Yes, ma'am. As well as reservists and national guards.

10:49:22 12 Q. Right. That would be on a full-time basis in this case?

10:49:25 13 A. If I were called up to active service, yes, ma'am.

10:49:27 14 Q. You could also be deployed overseas, right?

10:49:29 15 A. Yes, ma'am.

10:49:30 16 Q. And you are required to be deployment ready?

10:49:33 17 A. Yes, ma'am.

10:49:33 18 Q. In a deployment environment, is it fair to say that
10:49:38 19 service members are living in the same area?

10:49:42 20 A. Yes, ma'am.

10:49:43 21 Q. In close proximity?

10:49:45 22 A. They differ from place to place, location to location,
10:49:49 23 but, you know, you are all on the same base. You are not in
10:49:52 24 apartment buildings in town usually.

10:49:55 25 Q. And are you aware also that the medical facilities in a

10:50:00 1 deployed location can be pretty limited?

10:50:02 2 A. A lot of times they are, ma'am, and sometimes they are
10:50:04 3 better at that location.

10:50:05 4 Q. But there are also locations where they are significantly
10:50:08 5 worse than --

10:50:09 6 A. Yes, ma'am.

10:50:10 7 Q. -- at-home locations, correct?

10:50:11 8 A. Of course.

10:50:12 9 Q. You testified earlier about some medical exemptions. Do
10:50:29 10 you remember that?

10:50:29 11 A. Would you remind me please, ma'am?

10:50:35 12 Q. Well, your counsel asked you about whether you were aware
10:50:38 13 that medical exemptions have been granted through the Air
10:50:40 14 Force?

10:50:40 15 A. Oh, yes, ma'am.

10:50:41 16 Q. And are you aware that the medical exemptions that have
10:50:44 17 been granted are all temporary in nature?

10:50:46 18 A. Ma'am, I am just aware that there have been medical and
10:50:51 19 administrative exemptions given in the Air Force. I know
10:50:54 20 nothing of the specifics.

10:50:56 21 Q. Okay. So you don't have any personal knowledge of the
10:50:57 22 actual specific circumstances in which they are requested or
10:50:58 23 granted or duties required of the individuals who received
10:51:02 24 them, anything like that?

10:51:03 25 A. No. I just know that there are individuals that have

10:51:08 1 received medical and administrative exemptions who are
10:51:11 2 actively serving in their jobs in the Air Force right now.

10:51:16 3 Q. But you don't know whether those exemptions are temporary
10:51:17 4 or permanent?

10:51:17 5 A. I don't know, ma'am.

10:51:19 6 Q. And would you have any reason to dispute that the
10:51:22 7 exemptions are, in fact, temporary?

10:51:25 8 MR. WIEST: Objection, Your Honor. He said he
10:51:27 9 doesn't know.

10:51:27 10 THE COURT: I agree. Sustained.

10:51:30 11 BY MS. YANG:

10:51:31 12 Q. Do you ever take over-the-counter medications like
10:51:35 13 ibuprofen, aspirin, or Tylenol?

10:51:39 14 A. Yes, ma'am.

10:51:39 15 Q. When was the last time that you took one of those over-
10:51:39 16 the-counter medications?

10:51:40 17 A. Sometime last year maybe. Maybe while I was OTS
10:51:48 18 possibly, after all the exercising that we did.

10:51:51 19 Q. Did you know that those medications also use cell lines
10:51:54 20 that trace back to elective abortions?

10:51:58 21 MR. WIEST: Object, Your Honor. I don't think the
10:52:01 22 government's put any evidence on about the contents of these
10:52:03 23 products, and so I don't -- you know, we're assuming things
10:52:05 24 that aren't in evidence.

10:52:07 25 THE COURT: Counsel?

10:52:08 1 MS. YANG: Your Honor, given the limited record that
10:52:10 2 we have had the opportunity to establish here before this
10:52:12 3 preliminary injunction hearing, you know, we submit that we
10:52:15 4 would be able to submit evidence to support this in the normal
10:52:19 5 course of proceedings.

10:52:20 6 And further, that this goes to the substantial burden on
10:52:24 7 Second Lieutenant Poffenbarger's religious beliefs that he's
10:52:29 8 testified to.

10:52:31 9 THE COURT: There's been no -- there's been nothing
10:52:35 10 submitted in the briefing at this point in time with regard to
10:52:37 11 that, is there?

10:52:38 12 MR. WIEST: There's not, Your Honor.

10:52:41 13 MS. YANG: No, Your Honor.

10:52:53 14 MR. WIEST: Your Honor, this is a factual matter.
10:52:55 15 I'm not sure that it's true. So that's the real issue.

10:52:58 16 THE COURT: Thank you.

10:52:59 17 Lieutenant?

10:53:02 18 THE WITNESS: Yes, Your Honor.

10:53:03 19 THE COURT: If you took this medication, did you
10:53:06 20 have any idea if that is true or not?

10:53:08 21 THE WITNESS: I have never heard that, and I have no
10:53:10 22 knowledge of that, Your Honor.

10:53:10 23 THE COURT: Move on.

10:53:14 24 BY MS. YANG:

10:53:14 25 **Q.** What is your salary from your civilian employment?

10:53:17 1 A. I haven't done my taxes yet this year, but somewhere in
10:53:21 2 the neighborhood of \$60,000, ma'am.

10:53:23 3 Q. Do you receive retirement benefits from that employment?

10:53:26 4 A. They contribute I think it's 3 percent match to my IRA.

10:53:32 5 Q. Do you receive healthcare benefits through that
10:53:35 6 employment?

10:53:35 7 A. No, ma'am.

10:53:35 8 Q. What is your salary from your service in the reserve?

10:53:38 9 A. I think last year it totaled 5 or \$6,000, something
10:53:46 10 like that. I'm not sure. I haven't done my taxes yet.

10:53:51 11 Q. Is it fair to say that you will not get the COVID vaccine
10:53:56 12 because you believe it violates your religious beliefs?

10:54:00 13 A. I will not take these COVID vaccines because they are
10:54:07 14 against my religious beliefs, ma'am.

10:54:09 15 Q. Has getting the letter of reprimand changed your mind
10:54:13 16 about getting the current COVID vaccine?

10:54:17 17 A. No, ma'am.

10:54:17 18 Q. Would being placed in the Individual Ready Reserve change
10:54:18 19 your mind about getting the COVID vaccine?

10:54:20 20 A. No, ma'am.

10:54:20 21 Q. And is there any scenario that you can think of as of
10:54:24 22 right now in which you could get the existing COVID vaccine?

10:54:28 23 A. No, ma'am.

10:54:29 24 Q. Thank you.

10:54:40 25 THE COURT: Is that all, Counsel?

POFFENBARGER - REDIRECT (WIEST)

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10:54:41 1 MR. WIEST: I have brief redirect.

10:54:43 2 THE COURT: Is that all?

10:54:43 3 MS. YANG: Oh, yes. Thank you.

10:54:44 4 THE COURT: Redirect with regard to those matters
10:54:46 5 that were covered.

10:54:49 6 MR. WIEST: Right. Within the scope.

10:54:49 7 **REDIRECT EXAMINATION**

10:54:50 8 BY MR. WIEST:

10:54:51 9 Q. Sir, just real quick, have you previously been infected
10:54:55 10 with COVID-19?

10:54:56 11 A. Yes, sir.

10:54:57 12 Q. And you told the Air Force about that when that occurred?

10:55:00 13 A. I did, sir.

10:55:00 14 Q. Let me ask, you are currently in the intelligence officer
10:55:07 15 billet, correct?

10:55:08 16 A. That's correct.

10:55:08 17 Q. Were people able to perform those jobs in the
10:55:11 18 intelligence officer billet from March of 2020 through August
10:55:18 19 of 2021 notwithstanding the fact that there was no COVID
10:55:23 20 vaccine that was available?

10:55:23 21 A. Yes, they did.

10:55:25 22 Q. Was mission accomplishment an issue as a result of that?

10:55:28 23 A. Not to my knowledge. I believe they excelled very well
10:55:32 24 during that time.

10:55:32 25 Q. You had attended OTS without vaccination, correct?

POFFENBARGER - REDIRECT (WIEST)

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10:55:37 1 A. That's correct, sir.

10:55:38 2 Q. Do you know approximately how -- what the percentage of
10:55:43 3 the class was that was not vaccinated?

10:55:45 4 A. I don't know, sir, but on one of the initial dates when
10:55:49 5 we were there, the commander asked everyone who had been
10:55:54 6 vaccinated to raise their hands. And from where I was
10:55:56 7 sitting, it looked to be approximately 50/50. It may have
10:56:00 8 been higher but --

10:56:01 9 Q. OTS is a training environment where at least initially
10:56:04 10 there is yelling, screaming, everything that people partially
10:56:08 11 envision with a boot camp-type environment, correct?

10:56:11 12 A. Correct.

10:56:11 13 Q. Close quarters, correct?

10:56:13 14 A. Very close, sir.

10:56:14 15 Q. Room and uniform standards that have to be maintained,
10:56:17 16 correct?

10:56:17 17 A. That's correct.

10:56:18 18 Q. Intense environment, correct?

10:56:20 19 A. Very, very intense.

10:56:22 20 Q. And the Air Force was able to accomplish that with only a
10:56:24 21 50 percent vaccination rate in your OTS class, correct?

10:56:28 22 A. As I said, sir, I don't know what the percentage was,
10:56:31 23 but, yes, we accomplished it, and I think we did a very good
10:56:35 24 job.

10:56:35 25 Q. Let's talk about the intelligence school. Do you know if

POFFENBARGER - REDIRECT (WUEST)

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10:56:37 1 the Air Force was running the intelligence school operations
10:56:40 2 for people to attend intelligence school from March of 2020
10:56:43 3 through, say, September of '21?

10:56:45 4 A. Yes, sir, I believe they were.

10:56:46 5 Q. So the existence of COVID-19 did not preclude people from
10:56:51 6 being able to go through intelligence school?

10:56:55 7 A. No, sir. I think they put mitigation efforts into
10:56:57 8 effect, but it kept going, and I think everyone got trained
10:57:01 9 as they needed to be.

10:57:02 10 Q. Was the Air Force able to deploy into forward operating
10:57:06 11 environments from March of 2020 through September of 2021
10:57:09 12 notwithstanding the inability of a vaccine?

10:57:11 13 A. Yes, we did, sir.

10:57:12 14 Q. And I want to talk just briefly about the people that you
10:57:17 15 interact with. There is a mandate that came down from
10:57:21 16 Secretary Kendall to receive a vaccine.

10:57:23 17 A. Yes, sir.

10:57:24 18 Q. You're aware of it. In fact, we are here about it today,
10:57:28 19 right?

10:57:28 20 A. Yes, sir.

10:57:29 21 Q. My understanding -- maybe you can tell me, is it your
10:57:33 22 understanding that the Air Force has a vaccination rate of
10:57:36 23 over 95 percent?

10:57:37 24 A. I have been told that, and everyone I know in my unit
10:57:42 25 has been vaccinated.

10:57:42 1 Q. Okay. So the people that you would be interacting with
10:57:43 2 that government counsel is asking you about are actually
10:57:47 3 vaccinated?

10:57:48 4 A. Yes, sir, they all are.

10:57:49 5 Q. Okay. And, finally, government counsel asked you about
10:57:52 6 whether or not you were threatened with court-martial.

10:57:55 7 Can you turn to Exhibit 8 with me, please? Go to the
10:58:07 8 second page.

10:58:12 9 You with me?

10:58:12 10 A. Yes, sir.

10:58:13 11 Q. Paragraph 2. This is from Colonel Smith, your commander.
10:58:17 12 And I understand that he may be a special court-martial
10:58:20 13 commanding authority, correct?

10:58:21 14 A. That's my understanding, sir.

10:58:22 15 Q. Okay. "You are hereby reprimanded! As a member of the
10:58:29 16 United States Air Force, it is your duty to obey the lawful
10:58:30 17 orders from your commander. In the future, I expect you to
10:58:33 18 obey the orders of your commander and adhere to all laws and
10:58:37 19 Air Force standards."

10:58:37 20 Here's the key -- and I just want to make sure I am
10:58:40 21 reading this right. Actually, why don't you read that very
10:58:42 22 next sentence?

10:58:43 23 A. Sir, it says, "Further misconduct may result in more
10:58:46 24 severe action."

10:58:48 25 Q. Is a general court-martial more severe than a letter of

10:58:51 1 reprimand?

10:58:52 2 A. Yes, sir.

10:58:52 3 Q. Is a special court-martial more severe than a letter of

10:58:54 4 reprimand?

10:58:55 5 A. Yes, sir.

10:58:55 6 Q. How about an Article 15, is that more severe than a

10:58:59 7 letter of reprimand?

10:59:00 8 A. Yes, sir.

10:59:00 9 Q. And so it might not have been completely accurate that

10:59:03 10 you were not, in fact, threatened with a court-martial, right?

10:59:05 11 A. Now that I think about it, sir, I think that that

10:59:08 12 letter actually does state that.

10:59:09 13 Q. Thank you.

10:59:10 14 MR. WIEST: Nothing further, Your Honor.

10:59:11 15 THE COURT: Anything further with regard to those

10:59:12 16 few questions, counsel?

10:59:15 17 MS. YANG: Just very quickly, Your Honor.

10:59:20 18 THE COURT: Okay.

10:59:20 19 **RECROSS-EXAMINATION**

10:59:20 20 BY MS. YANG:

10:59:22 21 Q. Sir, you mentioned officer training school just now?

10:59:24 22 A. Yes, ma'am.

10:59:24 23 Q. Officer training school did not occur in a secure

10:59:27 24 facility, correct?

10:59:28 25 A. No, I don't believe there are any secure facilities

10:59:31 1 anywhere on the OTS campus.

10:59:33 2 Q. And OTS also did not occur in a deployed environment?

10:59:36 3 A. No, ma'am.

10:59:36 4 Q. You testified that you have previously been infected with
10:59:38 5 COVID-19. How many times?

10:59:40 6 A. I don't know, ma'am. I would assume one time.

10:59:46 7 Q. To the best of your knowledge?

10:59:47 8 A. To the best of my knowledge.

10:59:48 9 Q. When was that?

10:59:49 10 A. That would have been November, December 2020.

10:59:53 11 Q. Did you have any symptoms?

10:59:55 12 A. Yes, ma'am.

10:59:55 13 Q. What was the severity?

10:59:57 14 A. I don't know.

11:00:02 15 Does the Court want me to go into detail on my
11:00:05 16 sickness?

11:00:06 17 THE COURT: I think the question is whether -- what
11:00:11 18 was the severity. Was it, did you consider it severe or did
11:00:20 19 you consider it asymptomatic? What did you consider it?

11:00:22 20 THE WITNESS: Your Honor, I would have considered it
11:00:23 21 a bad cold.

11:00:24 22 THE COURT: A what?

11:00:25 23 THE WITNESS: A very bad cold.

11:00:27 24 THE COURT: A very bad cold.

11:00:27 25 I'm sorry. Go ahead.

11:00:28 1 BY MR. WIEST:

11:00:28 2 Q. How many days did you experience these symptoms?

11:00:32 3 A. Maybe five, ma'am.

11:00:32 4 Q. Are you aware that the CDC recommends that people who
11:00:37 5 have previously been infected nevertheless get vaccinated?

11:00:40 6 A. I have been told that, ma'am.

11:00:41 7 Q. Do you know what your current level of COVID-19
11:00:45 8 antibodies is?

11:00:45 9 A. No, ma'am.

11:00:46 10 Q. Have you ever taken an antibody test?

11:00:49 11 A. Yes, ma'am.

11:00:50 12 Q. And when was the last time you took an antibody test?

11:00:53 13 A. The antibody test was in January, I believe.

11:00:57 14 Q. Of this year or last year?

11:00:58 15 A. This year, ma'am. It was -- actually, yes, I do
11:01:02 16 remember. It was the week that I was there. So it would
11:01:07 17 have been the week of the 3rd of January, whenever that was,
11:01:12 18 the 3rd through the 7th. It was while I was at Wright-Patt.

11:01:15 19 Q. Has your physician told you that as a result of your
11:01:19 20 previous infection or the results of your antibody test that
11:01:23 21 you are now immune from COVID-19?

11:01:25 22 A. I have not spoken to a physician about that matter.

11:01:28 23 Q. Has any medical provider told you that as a result of
11:01:31 24 your infection or your antibody test results that you are now
11:01:38 25 immune from COVID-19?

11:01:38 1 A. Ma'am, I have not spoken to any medical professionals
11:01:41 2 about my immunity levels or anything like that.

11:01:44 3 Q. Thank you.

11:01:45 4 MS. YANG: Nothing further.

11:01:47 5 MR. WIEST: Nothing further, Your Honor.

11:01:48 6 THE COURT: Any reason this witness cannot be
11:01:51 7 excused then?

11:01:52 8 MR. WIEST: No, Your Honor. He can be excused.

11:01:54 9 MS. YANG: No, Your Honor.

11:01:54 10 THE COURT: Thank you very much.

11:01:55 11 THE WITNESS: Thank you, Your Honor.

11:02:01 12 THE COURT: Counsel for plaintiff, any other
11:02:02 13 witnesses?

11:02:04 14 MR. WIEST: No, Your Honor.

11:02:05 15 THE COURT: Do you wish to move exhibits?

11:02:06 16 MR. WIEST: Yes, Your Honor, I wish to move the
11:02:08 17 admission of Exhibits 1 through 8.

11:02:10 18 THE COURT: Any objections?

11:02:11 19 MS. YANG: No, Your Honor.

11:02:13 20 THE COURT: They will be admitted without objection.
11:02:13 21 (Plaintiff Exhibits 1 through 8, respectively, were
11:02:13 22 received in evidence.)

11:02:17 23 THE COURT: Any witnesses or testimony to be
11:02:18 24 presented, or evidence to be presented from the defendants?

11:02:21 25 MR. CARMICHAEL: No, Your Honor.

11:02:27 1 THE COURT: So I think we are down to elections.
11:02:30 2 And again, I would state for the record that counsel for both
11:02:32 3 the plaintiff and the defendants have submitted a great deal
11:02:37 4 of information. The Court has accommodated that by even
11:02:42 5 extending its length of the briefing matters. And the Court
11:02:49 6 is well versed in the positions and the issues in the case,
11:02:57 7 and now with the supplementing by Mr. Poffenbarger, his
11:03:00 8 testimony, the Court would indicate that it would be willing
11:03:05 9 to entertain at this point in time argument.

11:03:11 10 What I would suggest is we'll allow counsel for plaintiff
11:03:15 11 to present their argument; counsel for the defendants to
11:03:21 12 present their argument; then a short reply, if that's
11:03:26 13 necessary, on behalf of the plaintiff.

11:03:30 14 Any questions, counsel, how we want to proceed?

11:03:34 15 MR. CARMICHAEL: No, Your Honor.

11:03:35 16 MR. WIEST: No, Your Honor.

11:03:36 17 THE COURT: Counsel for plaintiff.

11:03:39 18 Counsel for plaintiff, or before we get started -- well,
11:03:47 19 no. I'll let you go ahead. I'll let you go ahead.

11:03:49 20 MR. WIEST: Your Honor, it was interesting,
11:03:50 21 Mr. Bruns and I were standing outside this morning, and we saw
11:03:55 22 a quote from Judge Rice on the wall that said "The price of
11:03:59 23 freedom, in truth -- is, in truth, eternal vigilance." And
11:04:04 24 Judge Rice was referring, of course, to the constitutional
11:04:08 25 republic that we take an oath too as attorneys, as judges, and

11:04:14 1 as military officers.

11:04:17 2 Your Honor, this is a case involving an act of Congress,
11:04:21 3 the Religious Freedom Restoration Act, and this is a case
11:04:24 4 involving the First Amendment and the Free Exercise clause.

11:04:27 5 And in both of those instances, I think it is without
11:04:32 6 dispute that the Air Force has granted thousands of medical
11:04:37 7 and administrative exemptions and all but a handful of
11:04:43 8 religious exemptions. And there is some context on that that
11:04:47 9 came out of Florida that we supplemented yesterday that
11:04:50 10 suggests that those, in fact, are people that are at the very
11:04:54 11 end of their term of service, and so if they are a month or
11:04:58 12 two from terminal leave, yeah, they will grant them one, but
11:05:00 13 otherwise, no.

11:05:01 14 And it's interesting, and the reason, Your Honor, that I
11:05:03 15 think it's interesting is the burden here. Does Lieutenant
11:05:10 16 Poffenbarger have a sincerely held religious belief? Well, we
11:05:14 17 know that he does. In fact, the Air Force hasn't really
11:05:16 18 disputed it. In fact, you know, General Scobee, who reviewed
11:05:20 19 his request, acknowledged it.

11:05:21 20 Do they sincerely -- or do they substantially burden it?
11:05:24 21 I don't think there is a dispute about that either.

11:05:27 22 So the question is whether or not what they are doing
11:05:31 23 here meets the narrow tailoring standard. And the U.S.
11:05:36 24 Supreme Court has been pretty clear that it's their burden.
11:05:37 25 And that's the *Tandon versus Newsom* case. And that's the

11:05:41 1 government's burden.

11:05:43 2 And I'll just read a passage from it. "Where the
11:05:45 3 government permits other activities to proceed with
11:05:47 4 precautions, it must show that the religious exercise at issue
11:05:50 5 is more dangerous than those activities, even when the same
11:05:54 6 precautions are applied."

11:05:55 7 One would think the government would have come in here
11:05:57 8 and given context of the thousands of administrative and
11:06:01 9 religious exemptions that they have granted -- that they are
11:06:04 10 in other career fields; that they don't involve the same job
11:06:08 11 duties or same people interactions that Lieutenant
11:06:11 12 Poffenbarger did. But, Your Honor, the record doesn't
11:06:13 13 demonstrate the government meeting that burden at all. And I
11:06:16 14 want to be clear, it is the government's burden. The U.S.
11:06:19 15 Supreme Court has said so.

11:06:22 16 We look at *Fulton*. *Fulton* talks about religious
11:06:26 17 accommodations and exemptions, an individualized
11:06:31 18 consideration. And that's what we've got here, Your Honor.
11:06:33 19 We've got individualized consideration of medical and
11:06:38 20 administrative exemptions and individualized consideration of
11:06:39 21 religious exemptions. And *Fulton* speaks to the fact that what
11:06:42 22 we are dealing with here is strict scrutiny.

11:06:44 23 And, finally, Your Honor, we've got the Sixth Circuit's
11:06:48 24 decision in *Dahl* issued just a few months ago, *Dahl versus*
11:06:51 25 *Board of Trustees of Western Michigan University*. And that

11:06:53 1 was a vaccine case. That was a vaccine religious exemption
11:06:58 2 case. And that was a case, in my estimation, that is on all
11:07:02 3 fours with this case in which we're dealing with a lack of
11:07:07 4 religious exemptions. And at least in that case they -- the
11:07:10 5 defendants came in and said, "Well, listen. We're not even
11:07:14 6 granting medical and administrative."

11:07:16 7 And what the Court said was, "We don't care. You got a
11:07:19 8 system to process it. That's good enough for us. Strict
11:07:23 9 scrutiny applies." That's what the Sixth Circuit says.

11:07:27 10 And so, Your Honor, when we look at the language that the
11:07:30 11 Sixth Circuit came out with in *Dahl* that talks about, for
11:07:33 12 instance, that if you're allowing these medical and
11:07:38 13 administrative exemptions, you know, I don't know how the
11:07:41 14 government meets its burden -- and it is its burden -- under
11:07:44 15 strict scrutiny. If it's good enough for medical and
11:07:47 16 administrative purposes, it's good enough for religious
11:07:50 17 purposes.

11:07:51 18 And I realize Colonel Poel in his declaration says that
11:07:54 19 they are saving the medical and administrative exemptions, you
11:07:57 20 know; that the reason they are not granting the religious
11:08:00 21 exemptions in paragraph 7 of his declaration is they want to
11:08:03 22 save them. Your Honor, with all due respect, that is an
11:08:06 23 admission of religious discrimination. That is an admission
11:08:11 24 of a violation of the United States Constitution.

11:08:13 25 And I know we have seen case law from the defendants that

11:08:16 1 suggest that, oh, it's the military. It's different. We need
11:08:18 2 to somehow defer.

11:08:20 3 But I'm back to some language in *Fulton* that talks about
11:08:23 4 deference. And I wanted to just leave the Court with this
11:08:27 5 when it talks about deference because of the exemptions. And
11:08:32 6 this begins in the *Fulton* decision by the U.S. Supreme
11:08:35 7 Court -- and I know we're not in the U.S. Reports because it's
11:08:38 8 a relatively recent case, was issued in 2021 -- at 1878. 141
11:08:45 9 Supreme Court 1878 is the pin cite. "No matter the level of
11:08:50 10 deference we extend to the government" -- in that case the
11:08:52 11 city -- "the inclusion of a formal system of entirely
11:08:54 12 discretionary exemptions renders the contractual and
11:08:58 13 nondiscrimination requirement not generally applicable."

11:09:01 14 Your Honor, *Fulton* also talks about the creation of a
11:09:08 15 formal -- and I'm reading again at 1879 -- "The creation of a
11:09:14 16 formal mechanism for granting exceptions renders a policy not
11:09:17 17 generally applicable, regardless whether any exemptions have
11:09:20 18 been given, because it invites the governments to decide what
11:09:22 19 reasons for not complying with the policy are worthy of
11:09:22 20 solicitude."

11:09:27 21 So we are clearly in strict scrutiny. We are clearly
11:09:31 22 looking at whether or not the government has met a substantial
11:09:32 23 burden of strict scrutiny. And they say, well, COVID vaccines
11:09:36 24 are important. They help protect public health. He might run
11:09:42 25 into, you know, other people. He might need to be in a

11:09:44 1 training facility with other people. I am sure you are going
11:09:47 2 to hear all of that in a couple minutes.

11:09:49 3 No doubt. We don't disagree with all that. But the
11:09:53 4 problem is the government themselves have acknowledged that
11:09:56 5 that doesn't matter when it comes to administrative and
11:10:00 6 medical exemptions. And if you are going to grant that, you
11:10:04 7 have to treat the religious exemptions the exact same way.
11:10:08 8 And granting thousands of them, whether you want to call them
11:10:12 9 temporary or not, fine, grant Lieutenant Poffenbarger a
11:10:12 10 temporary exemption until a vaccine comes out that doesn't
11:10:16 11 contain aborted fetal tissue and then he will go and he will
11:10:19 12 get it. Treat him the same. That's all we are asking for.

11:10:21 13 The government has never come forward and explained why
11:10:26 14 they can grant thousands of those and meet military readiness
11:10:26 15 and force protection requirements, thousands of administrative
11:10:27 16 or medical exemptions, or to explain the context or to
11:10:30 17 distinguish the context. They have never done it. There is
11:10:33 18 no proof in the record. It was their burden. I'm shocked
11:10:35 19 they didn't put a witness on to explain it today. Yet here we
11:10:39 20 are. It's their burden. We put on the only witness, and we
11:10:43 21 met our burden showing that he had a sincere religious belief,
11:10:46 22 and they substantially averted it.

11:10:49 23 So, Your Honor, based on this record, in part, I think
11:10:51 24 that there is a growing trend of district court decisions
11:10:53 25 coming out granting these preliminary injunctions that is

11:10:58 1 weaved in; that there is a tidal wave of these coming forward,
11:10:59 2 and that's because the government is systemically grant --
11:11:02 3 systemically violating the Constitution and RFRA.

11:11:05 4 And so, you know, there is either going to either
11:11:08 5 continue to be piecemeal or at some point hopefully maybe
11:11:12 6 somebody will give permanent injunction or perhaps a
11:11:16 7 preliminary injunction that extends to all of the Air Force,
11:11:18 8 to the point that we can start to follow the Constitution and
11:11:21 9 RFRA because it is a systemic problem right now that, you
11:11:24 10 know, this double standard, and it's got to stop. It's
11:11:26 11 illegal under Sixth Circuit precedent. It's illegal under
11:11:29 12 U.S. Supreme Court precedent.

11:11:30 13 Your Honor, with that I'm happy to take any questions the
11:11:33 14 Court may have. Judge, any questions?

11:11:39 15 THE COURT: No, not at this point in time.

11:11:41 16 MR. WIEST: Thank you, Your Honor.

11:11:44 17 THE COURT: Thank you.

11:11:45 18 Counsel. Counsel, before you get started, I just want to
11:11:52 19 confirm some things that the Court has taken from the records.

11:11:59 20 You are familiar -- you are familiar with the Navy SEAL 1
11:12:04 21 case, correct?

11:12:05 22 MR. CARMICHAEL: Yes, very familiar. I am actually
11:12:07 23 a counsel in that case.

11:12:14 24 THE COURT: Well, good. At this point in time, you
11:12:17 25 are not disputing the data that was contained in Colonel Jason

11:12:20 1 Holbrook's declaration pursuant to the Court's order down
11:12:25 2 there?

11:12:25 3 MR. CARMICHAEL: No, no. There is updated data
11:12:28 4 there, and then there is a cover -- there is a cover letter
11:12:33 5 explaining the data, but, no, that's Air Force data.

11:12:40 6 THE COURT: And can you -- can you just confirm for
11:12:42 7 me that the disciplinary actions that the Air Force has taken
11:12:48 8 now against Lieutenant Poffenbarger is that, to date, they
11:12:57 9 issued him a letter of reprimand on January the 6th which was
11:13:01 10 then rescinded, a new letter of reprimand was issued on
11:13:05 11 January the 10th, and then they issued him a notification of
11:13:11 12 denial of participation which excused him from his weekend
11:13:16 13 reserve duty and placed him in a no-pay/no-point status; is
11:13:21 14 that correct?

11:13:21 15 MR. CARMICHAEL: That's correct.

11:13:22 16 THE COURT: All right. Now, does the notification
11:13:25 17 of denial of participation then excuse him from all of his
11:13:30 18 duties with the Air Force so that he does not get paid or
11:13:35 19 acquire military points because he isn't actually doing the
11:13:38 20 work?

11:13:39 21 MR. CARMICHAEL: Yes, that's correct.

11:13:40 22 THE COURT: And are there any other actions at this
11:13:43 23 point in time that the Air Force has taken against Lieutenant
11:13:46 24 Poffenbarger?

11:13:47 25 MR. CARMICHAEL: Not yet. You know, there --

11:13:49 1 THE COURT: That's my next question. My next
11:13:52 2 question is, what disciplinary actions would the Air Force be
11:13:57 3 planning to take against Lieutenant Poffenbarger setting aside
11:14:02 4 the possibility of this Court's different rulings?

11:14:06 5 MR. CARMICHAEL: The Air Force does not consider
11:14:08 6 transfer to the IRR discipline. However, that is what they
11:14:12 7 are planning to do. They would move him to -- I mean, I don't
11:14:16 8 want to get ahead of the fact --

11:14:18 9 THE COURT: I understand.

11:14:19 10 MR. CARMICHAEL: -- with the letter of reprimand,
11:14:21 11 his response, the consideration of that response, but, you
11:14:24 12 know, I think it's fair to assume that he will ultimately be
11:14:27 13 placed into the IRR, which will be a no-pay/no-point status,
11:14:32 14 until the end of his terms of service, which I'm not sure how
11:14:37 15 much that was -- it's usually three to four years -- and then
11:14:40 16 would be separated after that with an honorable discharge.

11:14:45 17 THE COURT: And I'm assuming at this point in time,
11:14:47 18 based upon kind of the unknowns here, that there would be no
11:14:50 19 anticipated timing of those actions?

11:14:55 20 MR. CARMICHAEL: No, not yet. Sometime in March
11:14:57 21 probably for the IRR part. And then I would suspect that he
11:15:01 22 would just stay in the IRR for -- until the end of his
11:15:06 23 service, his obligated service.

11:15:12 24 THE COURT: Well, that's the plan. What could the
11:15:14 25 Air Force do?

11:15:16 1 MR. CARMICHAEL: I mean, what could they do? There
11:15:18 2 is some limitations there with -- I mean, they could actually
11:15:25 3 separate him, but then you would have to do particular notice
11:15:30 4 for separating an officer. That hasn't been done.

11:15:34 5 You know, they could court-martial him, but nobody has
11:15:40 6 been court-martialed. It's very unlikely that anybody would.
11:15:43 7 And the withholding of that is at a very high level.

11:15:45 8 THE COURT: Well, getting back into the letter that
11:15:47 9 was received and there were questions about the threat,
11:15:52 10 basically that is an option, correct?

11:15:54 11 MR. CARMICHAEL: Oh, yes, yes.

11:15:55 12 THE COURT: Thank you. Then -- and you will
11:16:01 13 probably touch on this maybe in your argument, but I just want
11:16:04 14 to make sure I get this. This temporary medical
11:16:15 15 administrative exemption minus a religious exemption, where
11:16:24 16 someone is -- well, let me -- where someone's allergic to the
11:16:30 17 component of the vaccine, then what accommodations, to your
11:16:34 18 knowledge, have been made and what restrictions have been
11:16:38 19 imposed on that person?

11:16:40 20 MR. CARMICHAEL: I do have a whole speech on that,
11:16:44 21 but I --

11:16:44 22 THE COURT: Somehow I knew you would.

11:16:45 23 MR. CARMICHAEL: I thought that would be a major
11:16:47 24 area of the Court's questions. So I can --

11:16:51 25 THE COURT: If you want to include that, just

11:16:53 1 address it in your presentation. I don't want to derail you,
11:16:55 2 counsel. I'm just trying to make sure that there are certain
11:16:59 3 points that are touched.

11:17:01 4 MR. CARMICHAEL: Please, you know, interrupt me and
11:17:03 5 ask questions in that part as well.

11:17:10 6 THE COURT: And my final question -- and then I'll
11:17:13 7 just turn you loose then -- in opposition's brief there have
11:17:21 8 been references made that service members in Lieutenant
11:17:26 9 Poffenbarger's unit, including reservists, must stay
11:17:29 10 deployment ready. I hear that term "deployment ready." What
11:17:33 11 would deployment entail for Lieutenant Poffenbarger
11:17:39 12 specifically?

11:17:40 13 MR. CARMICHAEL: Well, you know, sometimes it's hard
11:17:43 14 to estimate what exactly it would be because of the changing
11:17:48 15 environment. We have had -- for reservists, we called on
11:17:55 16 reservists heavily during Iraq and Afghanistan. I was in
11:18:00 17 Afghanistan with a year -- for a year sitting across from two
11:18:04 18 Air Force reservists that I worked together with in Kabul. So
11:18:10 19 that's likely. It's likely he would be augmented to fill a
11:18:15 20 position in a war zone if it were -- luckily we -- well, we
11:18:22 21 don't have a war right now, so we're not talking -- but we
11:18:25 22 could. We could, Your Honor.

11:18:26 23 THE COURT: Do you know something that I don't know?
11:18:31 24 I'm sorry.

11:18:32 25 MR. CARMICHAEL: But that's the sort of thing that

11:18:33 1 we would expect.

11:18:34 2 Sometimes it could be to other bases, like one in Turkey
11:18:38 3 the Air Force goes to a lot. So we don't really know. It
11:18:41 4 could be in a theater. It could be overseas on a particular
11:18:45 5 base that they go to.

11:18:50 6 And one of the keys for that is that when you do
11:18:54 7 deployments, particularly in Afghanistan, there isn't sort of
11:18:59 8 health requirement -- health facilities there available, which
11:19:03 9 is why we require things like tetanus. It's not -- you know,
11:19:07 10 it's why also I kind of, you know, cringe a little bit when I
11:19:12 11 hear the herd immunity argument just because that doesn't make
11:19:15 12 any sense for the military. There is no herd immunity for
11:19:19 13 tetanus, but we require it because if you get shrapnel or you
11:19:24 14 get something crushed on your foot, you can't take care of
11:19:30 15 lockjaw in theater. So that's one of the things.

11:19:32 16 THE COURT: Okay. I think you've answered my
11:19:34 17 question. I said one final question. Now I have one final
11:19:37 18 question.

11:19:37 19 Do you agree that *Dahl* is on all fours?

11:19:41 20 MR. CARMICHAEL: No, no, Your Honor. I can talk
11:19:44 21 specifically about *Dahl*.

11:19:46 22 THE COURT: Why don't you make that part of your
11:19:48 23 presentation. I am going to let you go.

11:19:50 24 MR. CARMICHAEL: Okay.

11:19:51 25 THE COURT: Go ahead.

11:19:52 1 MR. CARMICHAEL: Military vaccines have been --
11:19:57 2 well, vaccines have been part of the military for a little
11:20:00 3 over 70 years, a constant part. It is not a new thing, and
11:20:07 4 COVID is not a new thing. A COVID vaccine is not a starting
11:20:14 5 of this new program.

11:20:17 6 It's had little controversy for that 70 years. There was
11:20:23 7 some back in the beginning of the Gulf War when anthrax was
11:20:29 8 added, some in the 2000s, but religious exemptions have been
11:20:33 9 very sparse -- religious exemption requests have been very
11:20:37 10 sparse over that period.

11:20:42 11 But with the addition of the COVID-19 vaccine, which now
11:20:45 12 puts the number that a service member must get up to ten,
11:20:50 13 we've had -- the military's had over 21,000 requests for
11:20:56 14 religious exemptions for the COVID-19 vaccine alone.

11:21:00 15 It's surprising for --

11:21:04 16 THE COURT: How many have been granted?

11:21:08 17 MR. CARMICHAEL: All together, somewhere in the
11:21:09 18 range of ten.

11:21:11 19 And they are, as counsel said, generally as I -- for
11:21:17 20 whatever reasons, some service members chose instead to submit
11:21:22 21 their terminal leave request, the admin exemptions for
11:21:28 22 terminal leave, they submitted it as a religious exemption
11:21:31 23 even though they were eligible for a terminal leave when it
11:21:34 24 was granted under those same administrative -- same sort of
11:21:38 25 factors.

11:21:41 1 The vaccine program for the military is not designed to
11:21:47 2 end a global pandemic. It's designed to make sure that
11:21:52 3 everybody in the force is deployment ready. Everybody has to
11:21:57 4 have a -- to be ready to go at any time, and reservists in
11:22:02 5 particularly because that's the full purpose of the Reserves.

11:22:06 6 We have talked a lot about Lieutenant Poffenbarger's
11:22:12 7 specific jobs he would do as a reservist and why those going
11:22:17 8 into the SCIF is very important. He could spread COVID at the
11:22:24 9 training for that five-month period, or that his job after, he
11:22:32 10 would be able to spread it there or contract it there.

11:22:36 11 But the main purpose of the Reserves is to be ready and
11:22:41 12 to be deployed at any time to those forward areas in which
11:22:47 13 medical care is often not available and in which it's very
11:22:52 14 costly to medevac somebody if they develop a condition.

11:22:56 15 The areas that somebody deploys to don't usually have the
11:23:01 16 medical capabilities to handle severe COVID, just like they
11:23:07 17 don't have the capabilities to handle any number of one of
11:23:10 18 those other ten diseases that we require service members to
11:23:15 19 get vaccinated for.

11:23:16 20 And that's why they actually call what Lieutenant
11:23:21 21 Poffenbarger would do on the weekends as annual training or
11:23:24 22 drill. It's because you are keeping your skills current and
11:23:29 23 keeping your readiness current for deployment. It really is
11:23:34 24 the main purpose of the Reserves.

11:23:43 25 For some of the legal arguments that I have seen for

11:23:46 1 this, for this case, for the other cases, you know, there is
11:23:52 2 always a little difficulty when we have -- when we have to
11:23:56 3 come in and explain military deference. That's sort of one of
11:24:02 4 the things I do for the Department of Justice. I've gone
11:24:05 5 around the country, and sometimes I am introducing the
11:24:08 6 plaintiff, sometimes even the court to military deference for
11:24:11 7 the very first time.

11:24:12 8 And the standard is surprising for some folks. For
11:24:17 9 plaintiffs, the plaintiffs didn't really touch on it. They
11:24:19 10 cited nonmilitary cases. But the one that is the standard for
11:24:24 11 deference in the military is the *Goldberg* [sic] case. That's
11:24:28 12 the Supreme Court case here.

11:24:31 13 So I think there is a couple quotes from the *Goldberg*.
11:24:35 14 It really just demonstrates that the military is different;
11:24:39 15 that it's not something I am saying, it's something the
11:24:42 16 Supreme Court is saying. So from Gold -- *Goldman*, "When
11:24:45 17 evaluating whether military needs justified particular
11:24:49 18 restriction on a religiously motivated conduct, the court must
11:24:53 19 give great deference to the professional judgment of military
11:24:55 20 authorities concerning the relative importance of a particular
11:24:57 21 military." And that's from page 507.

11:25:02 22 And that's -- the deference is to what the military, what
11:25:10 23 the compelling government interest is and their way of
11:25:13 24 addressing it.

11:25:14 25 And then for *Goldman*, which, I should have said up front,

11:25:19 1 is a case where a service member wanted to wear a yarmulke
11:25:23 2 with their unit and there was a -- there was a instruction
11:25:29 3 that you couldn't wear religious attire. And that was denied
11:25:34 4 because of good order and discipline, which I think is a less
11:25:37 5 compelling reason than the compelling reason we have not to
11:25:41 6 spread here, the spreading of disease. And the Supreme Court
11:25:46 7 said, "The First Amendment does not require the military to
11:25:50 8 accommodate such practices in the face of its view that they
11:25:53 9 would detract from the uniformity sought by the dress
11:25:57 10 regulations."

11:25:58 11 Here, the military has a view that -- that if this
11:26:02 12 service member -- and several others -- but this service
11:26:04 13 member in particular, we have put things for this service
11:26:06 14 member -- will not be deployment ready and will not be able
11:26:09 15 to perform his job if he does not get this vaccine.

11:26:13 16 I think one of the key parts that really emphasizes why
11:26:18 17 this is -- why this standard is different is actually in the
11:26:22 18 concurrence by Justice Stevens. And he says, "Because
11:26:27 19 professionals in military service attach great importance,
11:26:31 20 such great importance to the plausible interest, it is one we
11:26:35 21 must recognize as legitimate and rational even though personal
11:26:39 22 experience or admiration for the performance of the ragtag
11:26:43 23 band of soldiers that won us our freedom in the Revolutionary
11:26:48 24 War might persuade us that the government has exaggerated that
11:26:51 25 important -- the importance of that interest."

11:26:54 1 "Plausible and rational" are not the words that you hear
11:27:02 2 when talking about your regular First Amendment case, or your
11:27:08 3 regular RFRA case, and something that says even you defer to
11:27:13 4 it, even though we might think the government exaggerated the
11:27:16 5 importance of that interest. It just shows that it is a
11:27:20 6 different standard.

11:27:24 7 And courts often -- plaintiffs often come in and say,
11:27:31 8 okay, don't apply that standard because if you do, it is very
11:27:34 9 hard for a plaintiff to win. We know that. I mean, that's
11:27:38 10 the standard that they have set. It is very hard for a
11:27:40 11 plaintiff to win under that standard.

11:27:43 12 And in the transgender military service cases, which I
11:27:49 13 handle those as well, we lost four times in the district
11:27:54 14 court, four district courts. Each district court said that
11:27:59 15 the military deference standard doesn't apply for whatever
11:28:01 16 reason, you know. They had various reasons. Then we won
11:28:09 17 across the board on the appellate courts because the appellate
11:28:12 18 court said you didn't apply the right standard. You have to
11:28:16 19 apply a military deference, the military's explanation as
11:28:20 20 plausible.

11:28:26 21 That is -- that's the exact mistake that the three cases
11:28:28 22 that have not joined the military have made. They have not
11:28:31 23 applied the right standard. They will get reversed on appeal.
11:28:34 24 I am -- I am very confident that they will get reversed on
11:28:37 25 appeal because they applied the wrong military standard.

11:28:40 1 Here, the Court -- or the plaintiffs are asking this
11:28:42 2 Court to apply the wrong legal standard. So for *Dahl*, *Dahl* is
11:28:49 3 a nonmilitary case, so it's not on all fours for that reason.
11:28:54 4 But *Dahl* really doesn't advance the ball for plaintiffs at
11:28:58 5 all. Most of the arguments we didn't even make here in the
11:29:05 6 military. I obviously think like for *Dahl* you can just skip
11:29:09 7 to part C of the opinion because A and B don't really apply.

11:29:16 8 And then -- then we just go to what was -- what little
11:29:21 9 the university advanced. They actually specifically say,
11:29:26 10 "Defendants presented no evidence as to a compelling interest
11:29:31 11 as to that -- these particular plaintiffs." We presented lots
11:29:36 12 of evidence as to this particular plaintiff. So that was the
11:29:42 13 reason they rejected it in *Dahl*, because there was no evidence
11:29:44 14 presented. And that doesn't really apply here.

11:29:47 15 In fact, *Dahl* does ensure that this Court cannot follow
11:29:52 16 the Texas case because the Texas case found that the Navy does
11:30:00 17 not have a compelling interest in vaccinating service members.
11:30:05 18 But *Dahl* specifically says that they do not dispute that the
11:30:08 19 university had a compelling interest in vaccinating athletes
11:30:14 20 or students.

11:30:18 21 They did have a problem that there was no evidence as
11:30:19 22 to -- presented why they had to vaccinate those particular
11:30:23 23 athletes or as to why it was only athletes and not the school
11:30:28 24 in general. Here, that issue is not on the table because we
11:30:34 25 are asking the entire military to be vaccinated.

11:30:39 1 So now let's turn to medical and admin exemptions. And I
11:30:46 2 think there are -- there is definitely things in the record
11:30:48 3 for that, and I can point the Court to it.

11:30:53 4 So the instruction is in the record as 22, tack 6 on the
11:31:07 5 docket. So you may not have that, but hopefully it's -- it's
11:31:18 6 on the docket, but the specific pages I would point the Court
11:31:22 7 to are pages 13 and 14 of 22, tack 6, and page 35 and 36 of
11:31:27 8 22, tack 6. And this is the instruction that specifically
11:31:33 9 explains what medical exemptions and what administrative
11:31:37 10 exemptions are.

11:31:39 11 So I'll start with the administrative exemptions. Those
11:31:46 12 are -- those are a bit easier to explain. Administrative
11:31:50 13 exemptions, there is a chart on page 35 that shows what they
11:31:52 14 are. They are all limited duration. They can't last more
11:31:57 15 than 180 days. And the Air Force -- and we also have the
11:32:01 16 declaration from Lieutenant Colonel Little -- explains that
11:32:03 17 they have been giving them to -- with just 22, tack 16, that
11:32:08 18 explains that they have been giving them for folks on terminal
11:32:12 19 leave.

11:32:13 20 And terminal leave is something in the military where you
11:32:21 21 generally transfer over 90 days of leave a year. Since you
11:32:26 22 accrue leave while you are on leave, you can end up with 120
11:32:29 23 days of terminal leave. And that is -- I mean, I took it when
11:32:34 24 I got out of the military. I think I accrued 90, and I
11:32:37 25 started at DOJ while I was still getting paid and still on

11:32:41 1 active duty at the -- from the Navy.

11:32:43 2 And you actually -- I left the office. You're not
11:32:47 3 deployable anymore. And the Air Force did not find that it
11:32:52 4 had a need to have people that were leaving the service and
11:32:56 5 weren't coming into the office anymore, weren't being
11:32:59 6 deployable anymore to have them get the vaccine.

11:33:04 7 Very different circumstance than Mr. -- than Lieutenant
11:33:07 8 Poffenbarger who is looking to start a career. He is looking
11:33:10 9 to start a new career. He is not at the very end. He wants
11:33:14 10 to go to a five -- a five- to six-month course, which is
11:33:18 11 almost twice as long as the terminal leave time that
11:33:22 12 individuals have, and he wants to go into a position where the
11:33:25 13 main job is to be deployable. So admin exemptions are quite
11:33:41 14 different.

11:33:44 15 The medical exemptions are quite different as well.
11:33:47 16 There is also -- so we have that again in two spots. So the
11:33:48 17 medical exemptions are the same pages that I have you go to
11:33:51 18 for the actual instruction, and it's docket 22, tack 6, page
11:33:55 19 13, and explains generally what they -- what they are. So
11:34:02 20 for -- and they give examples: immune competence,
11:34:06 21 pharmacological radiation therapy, pregnancy, adverse --
11:34:10 22 adverse reactions are the ones, the examples that they give in
11:34:17 23 there.

11:34:17 24 And then on 22, tack 2, Colonel Chapa kind of says
11:34:24 25 basically the same thing, that that's what they are for. We

11:34:31 1 have done -- in some of the other cases, we have done a
11:34:33 2 breakdown in trying to see where those are coming from. They
11:34:40 3 are overwhelmingly pregnancy. So that is -- it is a
11:34:46 4 significant difference from Lieutenant Poffenbarger's
11:34:49 5 condition. He's not pregnant. A pregnant person is going to
11:34:56 6 be required -- expected to get the vaccine as soon as they are
11:35:01 7 not pregnant, and go back into a deployable status.

11:35:05 8 THE COURT: So what happens prior to that? So what
11:35:08 9 happens?

11:35:08 10 MR. CARMICHAEL: So if they are pregnant? So they
11:35:12 11 will go in -- so they -- you are having regular meetings with
11:35:15 12 your OB/GYN. You ask for a exemption and your OB gives that
11:35:29 13 to you, but there is a Department of Defense policy that says
11:35:32 14 you have to get the vaccine within two weeks of the pregnancy
11:35:37 15 ending. So it's a temporary exemption for the pregnancy.
11:35:40 16 Some OBs are -- are granting them.

11:35:43 17 But those -- if you actually look at the numbers, the
11:35:46 18 numbers are going down consistently. Every week when -- when
11:35:51 19 we're doing that in the Florida case, every two weeks they
11:35:57 20 would go down because we are past the deadline for getting
11:35:58 21 them. So all we see is them expiring at this point.

11:36:02 22 And we expect within nine months that most pregnancy ones
11:36:05 23 will be gone. And within a year, almost all medical
11:36:09 24 exemptions will be gone. And the reason for that is even if
11:36:12 25 you are a person that has one of these other conditions -- you

11:36:16 1 know, let's say cancer is another one, or cancer, radiation, a
11:36:21 2 lot of times they don't advise getting a vaccine while you are
11:36:25 3 taking radiation -- if you are nondeployable for a year, if
11:36:30 4 you are active duty, they move to separate you, give you a
11:36:34 5 medical board. If you are in the Reserves, they move you to
11:36:37 6 the IRR. It's the same exact things that the Air Force is
11:36:42 7 doing -- wants to do to Second Lieutenant Poffenbarger.
11:36:44 8 That's what would happen to a medical exemption if they can't
11:36:48 9 become deployable. Because the purpose of the program is to
11:36:52 10 get somebody back to a deployable status.

11:36:56 11 THE COURT: Now, those medical -- those medical
11:37:08 12 exemptions focus on the health of the individual, correct?

11:37:11 13 MR. CARMICHAEL: Yes.

11:37:12 14 THE COURT: It's a different thing here we're
11:37:16 15 talking with regard to Lieutenant Poffenbarger?

11:37:20 16 MR. CARMICHAEL: I would say the military has an
11:37:22 17 interest in both, right? I mean, so -- and the military's
11:37:25 18 interest is served in both of these things. One is the health
11:37:27 19 of the individual, and from Lieutenant Poffenbarger and for
11:37:32 20 those around it. And in these cases, the health of the
11:37:37 21 individual is also served through these medical exemptions.

11:37:41 22 And I would say what is the rare case is the adverse
11:37:44 23 reaction one. Those are -- the Air Force has not granted any
11:37:46 24 permanent medical exemptions but the Army has. And you saw
11:37:52 25 that number, I think it was five, the last one we did. And

11:37:55 1 every single one of those was somebody that had an adverse
11:37:58 2 reaction to the shot. So, one, they had some antibodies from
11:38:03 3 the first shot, but they went into anaphylaxis or they got
11:38:07 4 some -- an issue, myocarditis. In that case not giving them
11:38:12 5 the second shot is better for their health. It would harm
11:38:15 6 them to give them a second shot. And so in both cases the
11:38:20 7 military has made a determination that it is for the health of
11:38:26 8 the person to actually give that medical exemption.

11:38:30 9 THE COURT: Any other kind of example with regard to
11:38:36 10 a communicable disease or communicable illness?

11:38:40 11 MR. CARMICHAEL: That the military does? The flu
11:38:42 12 shot. The military requires an annual flu shot.

11:38:44 13 THE COURT: No. What I mean, as to an exemption, a
11:38:47 14 medical exemption. Let's deal with the facts. I mean, we are
11:38:50 15 asking here were a medical exemption to -- because of not only
11:38:53 16 a concern for the individual, but concern for those around
11:38:56 17 him, or her.

11:39:01 18 MR. CARMICHAEL: For medical. So medical is for the
11:39:04 19 individual with the goal of getting the person back to a
11:39:11 20 deployable status within a year because there is that kind of
11:39:14 21 time line where we have to try to separate you within a year.
11:39:17 22 And then the -- except for those rare cases where you get the
11:39:21 23 permanent one, and that's for the health of the individual not
11:39:24 24 to give them. They will still have to get re-evaluated. In
11:39:27 25 the Air Force they have to get re-evaluated every year. In

11:39:30 1 the Army they have to get re-evaluated every five years.

11:39:35 2 Your Honor, do you have anymore questions about medical
11:39:38 3 or admin exemptions?

11:39:41 4 THE COURT: Hold on a second.

11:39:47 5 (Pause.)

11:40:44 6 THE COURT: Sorry, counsel. I have no other
11:40:47 7 questions. Go ahead.

11:40:48 8 MR. CARMICHAEL: Yes, Your Honor. I would -- I
11:40:50 9 would want to -- there was one issue there, and this was
11:40:53 10 the -- with the Texas courts I think made a mistake on is that
11:40:59 11 if you get a medical exemption, that doesn't mean that you are
11:41:04 12 deployable. It doesn't mean you are going in and being around
11:41:05 13 the Force. That was one that we specifically pointed out.

11:41:10 14 The Court said we were treating special operators
11:41:15 15 differently because we were allowing people with medical
11:41:19 16 exemptions to deploy but we are not allowing people with
11:41:23 17 religious exemptions to deploy. That's not correct. We
11:41:30 18 weren't allowing people with medical exemptions to be special
11:41:31 19 operators. They were taken out of the career field. And we
11:41:34 20 pointed that out to the court. I don't know how that's been
11:41:39 21 worked out on the appeal. That was not a basis of the court's
11:41:40 22 findings.

11:41:43 23 Moving to the -- moving to the other factors briefly.
11:41:52 24 Getting transferred to the IRR is not irreparable harm. We --
11:41:57 25 I mean, we hope Second Lieutenant Poffenbarger does come back.

11:42:03 1 You know, he said that he won't take the -- any current
11:42:08 2 version of the vaccine. If he changes his mind, you know,
11:42:15 3 we'll welcome him back or maybe if another one comes out he
11:42:19 4 can return back, and that's the whole purpose of the IRR is he
11:42:27 5 can return back. So that's not irreparable harm.

11:42:30 6 And the -- and sort of the line that even if that's a
11:42:34 7 constitutional infringement of rights for even a second
11:42:38 8 because a lot that is going to -- interesting plaintiffs make
11:42:42 9 that argument for irreparable harm because they can't meet the
11:42:47 10 employment irreparable harm. Well, that doesn't -- you can't
11:42:51 11 meet that standard if the military is justified in actually
11:42:55 12 taking the action as it is here, and like the *Goldberg* -- the
11:43:02 13 *Goldman* case was.

11:43:04 14 And the balance of equities are strongly in favor of the
11:43:08 15 military. Let's not forget the plaintiff did ask to have the
11:43:15 16 court grant 10,000 religious exemptions, which is clearly --
11:43:26 17 that would be very strong in favor of the military for
11:43:29 18 granting that and granting relief for people that are not in
11:43:32 19 front of the court.

11:43:34 20 But even as to plaintiff -- to the plaintiff, sending him
11:43:40 21 to the school and having him exposed to other students or
11:43:45 22 sending him into the unit is still the balance of equities
11:43:50 23 still tip in favor of the military. And even having him in
11:43:53 24 the reserve unit where he is not qualified to deploy, somebody
11:43:58 25 else might have to deploy in his spot.

11:44:00 1 I mean, I don't know exactly the way the Air Force works.
11:44:06 2 I do know the way the Navy works for that. I mean, there is a
11:44:09 3 random pool, and everybody is in it. And if you are not
11:44:12 4 available to be deployed, that's one -- one less person that's
11:44:16 5 in the Reserves and is not deployable, one less shot that
11:44:21 6 everybody else deploys, which is a fundamental unfairness to
11:44:25 7 the other folks.

11:44:26 8 Unless the Court has any further questions, thank you.

11:44:32 9 THE COURT: No, I don't. Thank you.

11:44:33 10 Counsel?

11:44:37 11 MR. WIEST: Just very briefly to wrap up, Your
11:44:41 12 Honor, I wanted to address because what I heard, and I frankly
11:44:44 13 heard it a lot in the last two years with Mr. Bruns' and I's
11:44:51 14 COVID litigations, we litigated -- it's kind of interesting
11:44:55 15 where we get to litigate the cases you cite, and we have got
11:44:59 16 to do that in this case. We have litigated the *Roberts* case
11:45:02 17 to the Sixth Circuit; we have litigated other cases.

11:45:05 18 What I heard the defendants argue is that they are
11:45:07 19 entitled to deference, so much deference, in fact, that they
11:45:11 20 get to run roughshod over the Constitution, or at least it's
11:45:15 21 fuzzy or maybe it sleeps or it naps during a pandemic. I
11:45:20 22 think the Sixth Circuit addressed that in the *Roberts* case.

11:45:24 23 But, Your Honor, I wanted to address the *Goldman* case and
11:45:27 24 the Sixth Circuit's treatment of that case in *Hartmann versus*
11:45:31 25 *Stone* on this deference issue. That was a case where truly

11:45:37 1 there was a neutral and generally applicable requirement. In
11:45:42 2 other words, the uniform requirements applied to everyone. It
11:45:48 3 was not an exception-ridden policy with individualized
11:45:53 4 exemptions.

11:45:54 5 And I wanted to point the Court to *Hartmann versus Stone*.
11:45:56 6 This is the Sixth Circuit's discussion of deference in terms
11:45:59 7 of the military, in terms of that very observation. And this
11:46:03 8 is -- the pin cite on this is 68 F.3d at 985. Quote, "Those
11:46:11 9 religiously offensive regulations to which the court has
11:46:14 10 deferred appear to have always been, on their face, neutral
11:46:17 11 and generally applicable."

11:46:19 12 Your Honor, we are not dealing with that here. We are
11:46:20 13 dealing with individualized exemptions that the U.S. Supreme
11:46:24 14 Court has already indicated in *Fulton*, perhaps again in
11:46:28 15 *Tandon*, when we are dealing with these exemptions because they
11:46:31 16 are granting medical and administrative exemptions. It's not
11:46:36 17 neutral and generally applicable. In other words, it's not
11:46:40 18 the case that every single person in the entire Air Force has
11:46:42 19 to be vaccinated or else they are out. Right? That would be
11:46:45 20 a different case, and I know we made that point in our moving
11:46:49 21 papers. So we know that that's not the case.

11:46:51 22 And we know also that they have granted medical
11:46:53 23 exemptions for folks with allergies to the medical components.
11:46:57 24 Those aren't temporary in nature. Those are actually
11:47:00 25 permanent. If you look at Colonel Holbrook's declaration, he

11:47:04 1 indicates that.

11:47:07 2 I wanted to just address a couple other points.

11:47:10 3 Your Honor, if Congress wanted to draft a statute to
11:47:13 4 exempt out military from RFRA's applicability, they know
11:47:18 5 exactly how to do that. And, in fact, they did some of that
11:47:21 6 to exempt out federal prisoners in the Prison Litigation
11:47:27 7 Reform Act. I'm sure the Court's probably aware of that.
11:47:29 8 There's -- Congress knows how to write a statute.

11:47:33 9 And by the way, there is some relatively recent authority
11:47:38 10 from the D.C. District Court -- I know we cite it in our
11:47:41 11 moving papers -- *Singh versus McHugh*, that talks about this
11:47:45 12 deference issue. That's 109 F. Supp 3d 72.

11:47:47 13 You know, when we are dealing with RFRA, it's not just
11:47:50 14 anything the government wants goes. There is a standard here.
11:47:55 15 And unfortunately for the government, when they are granting
11:47:59 16 robust numbers of albeit perhaps temporary -- I mean, maybe we
11:48:03 17 will have to take their word on that -- not all of them are
11:48:07 18 temporary, by the way. Colonel Holbrook's declaration, I
11:48:10 19 think in the Florida case, reveals that some of them are
11:48:14 20 permanent exemptions for those that have the reactions that
11:48:16 21 government counsel indicated that, you know, when you get the
11:48:18 22 first shot and something really bad happens, you know, before
11:48:21 23 you get number two. No, that's a permanent exemption. And,
11:48:24 24 yes, there is a handful of those, and those aren't the
11:48:27 25 thousands that have been granted.

11:48:28 1 But the declaration is also clear that they renewed those
11:48:33 2 medical exemptions, and they continue to roll them out. And
11:48:37 3 part of the reason that they do that, Your Honor, is that if
11:48:39 4 somebody's got an allergy, well, maybe there is a new product
11:48:43 5 that will come out six months from now or a year from now that
11:48:46 6 won't have those same ingredients.

11:48:48 7 Maybe, Your Honor, if somebody's got a religious
11:48:52 8 objection to aborted fetal tissue, there is a product that
11:48:55 9 comes out in six months or a year from now, that if you
11:48:55 10 granted a temporary religious exemption, that wouldn't have
11:48:55 11 the same problem. And so I think when we look at that there
11:49:00 12 is a disparate treatment and there is a double standard that's
11:49:03 13 going on.

11:49:05 14 I didn't hear government counsel indicate whether or not
11:49:08 15 people could be deployed without a vaccine with a medical
11:49:11 16 exemption. I am not sure I ever heard the answer to that. I
11:49:14 17 think that that's an important question, because we just heard
11:49:16 18 about deployment, deployment, deployment.

11:49:18 19 But, again, the evidence that's been put on is the ops
11:49:22 20 tempo hasn't declined during COVID. The Air Force's ability
11:49:26 21 to accomplish its mission hasn't declined during COVID. They
11:49:31 22 have been able to do that from March of 2020 through September
11:49:34 23 of 2021.

11:49:35 24 And, yes, vaccines are a wonderful piece of new modern
11:49:41 25 technology, but we didn't have them for a year and a half in

11:49:44 1 the pandemic and life went on. And so this notion that it's
11:49:48 2 absolutely critical is belied not only by this past history
11:49:51 3 but again the robust numbers of the medical and administrative
11:49:57 4 exemptions.

11:49:58 5 Your Honor, I did just want to finish with *Goldman versus*
11:50:01 6 *Weinberger*. That was again a dress standard and was a neutral
11:50:07 7 and generally applicable regulation. And, you know, deference
11:50:13 8 out, you know, out of the room in terms of neutral and
11:50:16 9 generally applicable regulations, if this were a vaccine
11:50:20 10 mandate that applied to every single Airman in the entire Air
11:50:24 11 Force and Space Force with no exemptions whatsoever, I don't
11:50:28 12 think we'd have much of a case. But the thousands of
11:50:30 13 administrative and medical exemptions frankly demonstrate
11:50:34 14 otherwise.

11:50:37 15 If the Court has no further questions, Your Honor?

11:50:37 16 THE COURT: Thank you.

11:50:46 17 Okay. Counsel, I appreciate, one, your briefing. I
11:50:54 18 appreciate your presentations. I appreciate your hard work.
11:50:59 19 The Court will get to work and will issue a decision as
11:51:08 20 quickly as we can. I know we were working with maybe some
11:51:13 21 timelines here, but we will try to get something on as quickly
11:51:16 22 as we can.

11:51:17 23 Anything further, counsel?

11:51:20 24 MR. WIEST: No, Your Honor.

11:51:22 25 THE COURT: Counsel?

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MR. CARMICHAEL: No, Your Honor.

THE COURT: Again, thank you very much.

THE COURTROOM DEPUTY: All rise. This court stands
in recess.

(Proceedings concluded at 11:51 a.m.)

1 CERTIFICATE OF REPORTER

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